Supreme Court, U.S.
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No. 04-1249

IN THE

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO
Petitioner,

v.

CONTINENTAL AIRLINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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QUESTION PRESENTED

Whether the decision below of the United States Court of Appeals for the Fifth Circuit manifests a continuing infidelity to the controlling precedents of this Court mandating only limited review of awards by system boards of adjustment under the Railway Labor Act, by invading the adjustment board's exclusive jurisdiction to resolve the merits of the parties' minor dispute and substituting its interpretation of the parties' agreement for that of the board, thereby warranting this Court's exercise of its supervisory authority?

CORPORATE DISCLOSURE

The International Brotherhood of Teamsters, AFL-CIO, is an unincorporated labor organization and not a corporation. Accordingly, no disclosure under S. Ct. Rule 29.6 need be made.

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PETITION FOR A WRIT OF CERTIORARI

The International Brotherhood Teamsters, AFL-CIO ("IBT"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 15, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 391 F.3d 613. Appdx. 1a-12a.[1] The decision of the United States District Court for the Southern District of Texas was not published. Appdx. 15a-29a.

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[1] References to the Petitioner's appendix will be styled "Appdx. ___."

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on November 15, 2004. It issued its order denying the IBT's petition for rehearing en banc on December 14, 2004. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

Section 3, First (q) of the Railway Labor Act, 45 U.S.C. § 153, First(q) provides as follows:

> If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

Section 201 of the RLA, 45 U.S.C. § 181, provides as follows:

> All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Section 204 of the RLA, 45 U.S.C. § 184, provides as follows:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

> Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

STATEMENT OF THE CASE

The IBT and Continental Airlines, Inc. were parties to a collective bargaining agreement dated 1999-2001.[2] In August 2000, upon reporting to work, Continental aircraft mechanic Mark Johnson took an alcohol breath test that produced a result of .115 breath alcohol content. Continental terminated Mr. Johnson for reporting to work intoxicated.

Mr. Johnson grieved his discharge. That grievance was settled when Mr. Johnson, the IBT and Continental entered into a "last chance agreement," which provided for Mr. Johnson's reinstatement subject to certain conditions:

1. Submit to an initial evaluation by Continental's EAP Director or Director's designee.
2. Successfully complete the course of rehabilitation recommended by Continental's EAP, including all terms and conditions attached to such course of rehabilitation.
3. Execute and deliver to the EAP Director an undated letter of resignation to be used to terminate his em-

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[2] The parties entered an amended collective bargaining agreement that became effective on December 27, 2002.

ployment should he fail to satisfy any terms of this Agreement or of the rehabilitation directed by EAP.

4. During the remainder of his career with Continental, should Johnson subsequently fail any drug or alcohol (.04 or greater) test, the undated letter of resignation will be accepted by the Company, and his employment severed.

5. Failure to comply with the provisions of his continuing employment, termination will result, and his right to challenge such termination through the grievance process shall be waived.

6. He acknowledges that he will have no right to file a grievance concerning the Company's acceptance and execution of his letter of resignation and/or termination of employment.

7. Johnson and IBT agree to withdraw the grievance contesting Johnson's termination.

As part of his conditional reinstatement, Mr. Johnson was referred to the Continental Employee Assistance Program ("EAP") for an evaluation and assessment. He was diagnosed with alcohol dependency and completed an alcohol treatment program. Prior to being cleared by EAP to return to work, Mr. Johnson executed an EAP rehabilitation agreement with the Company in which he agreed to fulfill the following conditions:

1. During the one-year rehabilitation period, commencing on the date of the Agreement, any use of alcohol or illicit drugs will be considered a violation of the Rehabilitation Agreement. This includes mouthwash or other medications/substances which may contain alcohol. If your doctor prescribes medication that contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.

2. You are subject to no-notice testing during the rehabilitation period. The no-notice test screens for ten drugs, plus alcohol.

3. Violation of the Rehabilitation Agreement would result in termination of employment without recourse to the grievance process.

Mr. Johnson was reinstated after passing an alcohol test. Following his reinstatement, Continental subjected Mr. Johnson to eleven no-notice alcohol tests and two Department of Transportation tests from November 2000 through March 2001. Mr. Johnson passed all of these tests.

On March 20, 2001, Johnson called Continental EAP Director Skidmore and notified him that "he was taking cough medication." Thereafter, on March 22, 2001, Continental scheduled Mr. Johnson for an alcohol test. That testing produced an initial result of .040 BAC on a test performed at 12:40 p.m. and a confirmation result of .029 BAC at 1:05 p.m. Continental thereupon purported to accept Mr. Johnson's previously executed letter of resignation and terminated his employment.

Mr. Johnson filed a grievance protesting his March 23, 2001 termination. Evidentiary hearings were conducted before the parties' system board of adjustment sitting with Arbitrator John Flagler as neutral chairman. The system board, through Mr. Flagler, issued its award on February 7, 2003 upholding the grievance and reinstating Mr. Johnson. The board found that the last chance agreement and EAP rehabilitation agreement (referred to collectively herein as "the last chance agreement" or "the agreement") were valid and binding on Johnson. It also found, as agreed to by Continental, that it had jurisdiction to determine whether Mr. Johnson violated the agreement.

After resolving these threshold issues, the board made factual findings from the record and evaluated these facts in light of the last chance agreement to determine whether

Johnson violated his obligations under the agreement. Under paragraph 1 of the EAP agreement, Johnson was required to notify the EAP staff if his doctor "prescribes" medication containing alcohol or narcotics. The Board found uncontroverted both that Johnson obtained his doctor's approval to take an over-the-counter cough medication and that he notified Skidmore he was taking the medication. Based on these facts, the board concluded that Johnson "fully met the letter and spirit of Paragraph 1."

The board found to be unsupported by evidence Continental's assertion that Johnson violated the last chance agreement's prohibition on registering an alcohol test result of .040 or higher. It noted the record evidence established that Johnson's confirmation test result registered only .029 BAC. On this basis, the board concluded "the .029 confirmatory alcohol test obviously did not qualify for summary acceptance of the Grievant's undated letter of resignation." Based on its factual findings and interpretation of the applicable contract language, the board concluded that Continental failed to prove Johnson violated the last chance agreement.

On March 6, 2003, Continental filed a lawsuit in the United States District Court for the Southern District of Texas seeking to have the award of the system board of adjustment vacated. On January 8, 2004, the district court granted the IBT's motion for summary judgment, holding that the board acted within its jurisdiction under the Railway Labor Act. Continental appealed to the United States Court of Appeals for the Fifth Circuit. The district court stayed its judgment pending appeal. In a decision issued on November 15, 2004, a three-judge panel reversed the district court and vacated the arbitration award, because it disagreed with the system board's interpretation of the Agreement. Request for rehearing was denied. Appdx. 13a-14a. Jurisdiction was properly laid in the district court pursuant to 28 U.S.C. § 1331 and in the court of appeals pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS MANIFESTS INFIDELITY TO THE CONTROLLING PRECEDENTS OF THIS COURT GOVERNING JUDICIAL REVIEW OF AWARDS BY SYSTEM BOARDS OF ADJUSTMENT IN THAT THE LOWER COURT GAVE NO DEFERENCE TO THE BOARD'S INTERPRETATION OF THE PARTIES' AGREEMENT AND IT INVADED THE BOARD'S EXCLUSIVE JURISDICTION OVER THIS MINOR DISPUTE BY RESOLVING THE MERITS OF THE DISPUTE; THE COURT OF APPEALS' ACTION REFLECTS A REBELLION BY THAT COURT AGAINST THE STATUTORY SCHEME OF THE RAILWAY LABOR ACT AND ESTABLISHED AUTHORITY FOR REVIEW OF LABOR ARBITRATION AWARDS THAT WARRANTS REVIEW BY THIS COURT

This case presents the Court with same challenge it faced in *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504 (2001). Here too, a court of appeals, after reciting the long-standing principles governing review of labor arbitration awards set forth in *Steelworkers Trilogy*[3] and its progeny, applied those principles in a manner that is "nothing short of baffling." 532 U.S. at 510. The court below ignored past admonitions of this Court that system boards of adjustment under the Railway Labor Act are "the complete and final means for settling minor disputes,"[4] and that "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts."[5] Plainly

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[3] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[4] *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965).

[5] *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

exceeding its limited jurisdiction over such awards, described by this Court in *Sheehan* as "among the narrowest known to the law"[6], the court of appeals paid no deference to the board's interpretation of the parties' last chance agreement. Rather, it took it upon itself to resolve the merits of the parties' minor dispute in order to vacate the decision of the adjustment board. Despite the court of appeals' recitation of the applicable standard of review, its decision represents nothing short of a usurpation of the statutorily-mandated jurisdiction of the adjustment board and infidelity to this Court's controlling precedent. Exercise of this Court's supervisory authority is therefore necessary to undo the harm done to the adjustment board procedures by that decision, and to confine the United States Court of Appeals for the Fifth Circuit to the limited role established for it under the Railway Labor Act by Congress and this Court.

The limited role of the federal courts in reviewing labor arbitration awards is long settled. In *Enterprise Wheel & Car*, 363 U.S. 593, this Court held "[t]he refusal of courts to review the merits of an arbitration award is the proper approach under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." 363 U.S. at 596. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." *Id.* at 597. A mere ambiguity in the arbitrator's decision that may give rise to an inference he exceeded his authority is not a reason to vacate an award. *Id.* In *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, the Court noted: "the courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim or determining

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[6] *Id.* at 91.

whether there is particular language in the written instrument which will support the claim." 363 U.S. at 567-68.[7]

The Court expanded on the principles of *Steelworkers Trilogy* in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). There, the Court held "the reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government" in the dispute. 484 U.S. at 37. The deference paid to arbitration decisions by the federal courts reflects also the recognition that it is the arbitrator's interpretation which the parties have agreed to accept, not that of the courts; therefore, the courts do not sit in review of the merits of that decision. *Id.* at 37-38. The court's mere disagreement with the arbitrator's findings of fact, even those which are improvident or silly, or his interpretation of the agreement is not sufficient to vacate an award. *Id.* at 38. So long as the arbitrator is even "arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

The scope of judicial review of adjustment board decisions under the Railway Labor Act is even narrower. Unlike the federal courts' jurisdiction under Section 301 of the Labor Management Relations Act to hear disputes arising from collective bargaining agreements, 29 U.S.C. § 185, the courts have no jurisdiction over the merits of "minor disputes" arising from grievances or other interpretive disputes under such contracts that are within the exclusive jurisdiction of adjust-

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[7] The court of appeals held that the same deferential standard of review for interpreting arbitral awards under collective bargaining agreements applied to review of the system board's interpretation of the parties' last chance agreement. Appdx. 7a.

ment boards. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972); *Elgin, Joliet and Eastern Ry. v. Burley*, 325 U.S. 711, 727-28 (1946). Federal court review of these awards is "among the narrowest known to the law." *Sheehan*, 439 U.S. at 91. *See also Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 563 (1987). The Act sets forth in Section 3, First(q) the three grounds upon which a court may vacate or remand the decision of an adjustment board.[8] This Court has emphasized repeatedly the language of Section 3, First(q) "means what it says" and "only upon one or more of these bases may a court set aside an order of the Adjustment Board." *Sheehan*, 439 U.S. at 93.

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[8] Section 3, First(q) provides that a court may set aside the decision of an adjustment board only "for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." 45 U.S.C. § 153, First(q).

While Section 3, First(q) does not apply directly to boards of adjustment under Title II of the Act, the framework of the Act, reflected in Section 204's requirement that airline system boards of adjustment be vested with the jurisdiction accorded to the Adjustment Board under Section 3, demonstrates Congress' intent that the federal court's authority to review the awards of system boards under Title II be no broader than the scope of review permitted under Section 3. 45 U.S.C. § 184. *See also International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963)(mandate that parties adjust unresolved minor disputes before system board of adjustment is applicable to air as well as rail carriers; in view of the clearly stated purposes of the Act, Congress intended no hiatus in the statutory scheme for resolution of minor disputes in the air industry when it exempted air carriers from Section 3 and provided for the establishment of a separate national board of adjustment for the air industry). Accordingly, courts of appeal, including the court below, follow the strictures of Section 3, First(q) in reviewing decisions of airline system boards. Appdx. 6a. *See also Eastern Airlines v. Transport Workers Union*, 580 F.2d 169, 172 (5th Cir. 1978); *Air Line Pilots Ass'n v. Eastern Airlines*, 632 F.2d 1321, 1323 (5th Cir. 1980).

Given the exclusive jurisdiction of adjustment boards and their expertise in resolving minor disputes, the awards of such boards are entitled to presumptive weight. *Elgin, Joliet and Eastern Ry. v. Burley*, 327 U.S. 661, 664 (1946). Where the board of adjustment interprets the agreement, only if that interpretation is "wholly baseless and completely without reason" may it be set aside. *Gunther*, 382 U.S. at 261. While reciting the appropriate standard of review, the decision below failed to adhere to its exceedingly narrow jurisdiction under the RLA in passing on the award in the instant case. *See, e.g., Garvey*, 532 U.S. at 510 ("the court of appeals here recited these principles [for review of labor arbitration awards], but its application of them is nothing short of baffling.").

In vacating the award, the court of appeals focused on the language of the parties' EAP agreement that prohibited Johnson from using alcohol for a one-year period, including medication containing alcohol, but provided that "[i]f your doctor prescribes medication which contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication." Appdx. 3a, 63a. The court below rejected both the system board's conclusion that, by contacting his physician's office and receiving instruction from the physician's staff, as well as promptly notifying Continental's EAP Director that he was taking the medication, Johnson "fully met the letter and spirit" of the parties' agreement, Appdx. 10a, and the board's underlying interpretation of the physician requirement of the agreement to be a prohibition on self-medication. *Id.*

The system board's award was not an arguable construction of the parties' last chance agreement, in the court of appeals' view, because the arbitrator did not require "proof" of a doctor's order that Johnson take cough medication.[9]

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[9] Reviewing the burden of proof established by an arbitrator is an improper inquiry for a court. *Wilko v. Swan*, 346 U.S. 427, 436 (1953),

Appdx. 12a. The panel held "the Board's interpretation effectively reads 'doctor' out of the EAP agreement." *Id.* This conclusory assertion, however, simply masks what is a plain invasion of the adjustment board's exclusive jurisdiction over the merits of the minor dispute. Since the court of appeals acknowledged that the record before it was silent on the question of whether the doctor instructed Johnson directly or indirectly through his medical staff,[10] it had no basis in the adjustment board's findings to conclude "the uncontested evidence is that Johnson's doctor never approved the use of the cough medicine he took, either orally or by a formal prescription." Appdx. 11a-12a. It could reach this conclusion only by resolving for itself a factual issue on which the evidentiary record was silent.

Yet this Court holds that "established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision." *Garvey*, 532 U.S. at 511. Such a usurpation of the arbitrator's fact-finding role is obviously erroneous under the Railway Labor Act since the federal courts are divested of jurisdiction over minor disputes like Johnson's grievance. *Andrews*, 406 U.S. at 322. The courts are to accept the findings on the merits made by the adjustment board. *Gunther*, 382 U.S. at 263 ("the merits of the wrongful removal issue as decided by the Adjustment

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overruled on other grounds, Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989). Further, adjustment boards are not restricted to common law rules of evidence in resolving minor disputes. *Gunther*, 382 U.S. at 262.

[10] The lower court acknowledged that prior to taking the cough medication Johnson contacted his doctor's office and, after being told that the doctor would need to see him for an appointment before a prescription could be provided, was instructed by the staff to take over-the-counter cough medicine until his appointment date. Appdx. 10a, 11a. The record also established that Johnson informed Continental's EAP director he was taking the medication. *Id.*

Board must be accepted by the District Court."). The court of appeals' reversal of the adjustment board's decision, therefore, rested on its improper exercise of jurisdiction over the merits of the parties' minor dispute.

To overturn the award, the court of appeals also forced upon the adjustment board a cramped and myopic reading of the parties' last chance agreement that "doctor" could mean only action literally by the physician himself, rather than including action undertaken by the staff under his supervision. The lower court's very narrow reading of the agreement is evocative of the Supreme Court's observation in *Gunther*, in reversing the court of appeals there, that the lower court's interpretation of the collective bargaining agreement "[paid] strict attention only to the bare words of the contract" and, thus, "went well beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement." 382 U.S. at 261. The court below ignored the expertise of the adjustment board in resolving disputes arising under collective agreements, and imposed its own interpretation of the last chance agreement in place of the board's. *Gunther*, 382 U.S. at 261 ("Congress has established an expert body to settle 'minor' grievances like the petitioner's"); *Burley*, 327 U.S. at 664-65 ("the Board is acquainted with established procedures, customs and usages in the railway labor world . . . Its expertise is adapted not only to interpreting the collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond that which the Act confers").

The court of appeals' analysis of the adjustment board's decision fails to reveal that award as "wholly baseless and completely without reason." *Gunther*, 382 U.S. at 261. Indeed, despite its accusation that the adjustment board read the term "doctor" out of the last chance agreement, the lower court's decision does not deny that the board interpreted the

parties' agreement;[11] it merely disagreed with that interpretation. *Enterprise Wheel & Car*, 363 U.S. at 598 ("The court of appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.").

The decision below undermines the minor dispute regime which is a fundamental element of the Railway Labor Act's structure. By usurping the adjustment board's exclusive jurisdiction over the minor dispute arising from Johnson's grievance and installing itself as a super-arbitration panel, the court of appeals violated the clear congressional policy identified by this Court in *Sheehan*, which "considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." 439 U.S. at 94.

The Court of Appeals for the Fifth Circuit earlier signaled its intent to break free of the strictures imposed by the Act and this Court on the review of adjustment board awards in *American Eagle Airlines, Inc. v. Air Line Pilots Ass'n.*, 343 F.3d 401 (5th Cir. 2003). In the face of a dissent by Circuit Judge Dennis, which accused the panel majority of ignoring this Court's precedent for review of arbitral awards, the court of appeals affirmed a district court order vacating the system board award on the basis that it ignored the express language of the contract by setting aside a just cause discharge because the company failed to adhere to procedural requirements of the contract. 343 F.3d at 409. There, as here, the lower court ignored long-standing principles established by this Court regarding the authority of arbitrators to depart from the employer's choice of discipline, by holding that "if the relevant bargaining agreement requires just cause for dismissal,

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[11] The court of appeals acknowledged that the adjustment board interpreted, and did not ignore, the last chance agreement. Appdx. 7a.

an arbitrator acts beyond its jurisdiction by fashioning an alternate remedy once it has concluded . . . that an employee's conduct constitutes just cause for dismissal as the Board did here." 343 F.3d at 410. *See Misco*, 484 U.S. at 41 ("Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct."); *Enterprise Wheel & Car*, 363 U.S. at 597 (an arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.").[12]

Perhaps emboldened by *American Eagle*, the court below expanded its holding in that case, which at least purported to rely on the arbitrator's implicit factual findings, by relying on its own resolution of factual disputes in order to conclude Johnson's physician had not directed his use of cough medication and thereby set aside the adjustment board award. The lower court's decision demonstrates its ever-developing refusal to adhere to this Court's jurisprudence for review of arbitral awards and the congressionally-mandated scheme for resolution of minor disputes. By providing for essentially de novo review of adjustment board awards, the Fifth Circuit Court of Appeals discards the principal tool making effective the minor dispute process: the finality of awards. *Sheehan*, 439 U.S. at 94 ("The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations."). Indeed, its action here was contrary to the normal purpose of finality in such awards, namely, to benefit the employee by providing a final decision without the time and expense created by drawn out litigation. *Id.* ("Normally finality will work to the benefit of the worker: He will receive

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[12] *See also* 343 F.3d at 412 (Judge Dennis citing 9 TIM BORNSTEIN ET AL, LABOR AND EMPLOYMENT LAW § 11.09 (2003) and noting "arbitrators have used this broad remedial power to reduce or reverse the discipline meted out to employees where an employer has not abided by the labor agreement's prescribed grievance process.").

a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad.").

Mr. Johnson won before the tribunal mandated by the statute and the parties' agreement to resolve his dispute. The court of appeals, however, not content with its carefully circumscribed role, broke free of its limited jurisdiction to snatch away the victory he gained before the adjustment board. That is plainly not the purpose of the federal courts under the RLA identified by this Court. Returning the Fifth Circuit to the limited role created for it by Congress and this Court requires an admonishment as was delivered in *Garvey* when another court of appeals chafed at the restrictions placed upon it in reviewing arbitral awards. Review of the decision below is necessary to vindicate the statutory policy requiring the final and exclusive resolution of minor disputes before system boards of adjustment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20136

CONTINENTAL AIRLINES, INC.,
Plaintiff-Counter Defendant-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

November 15, 2004
Charles R. Fulbruge III, Clerk

Before BARKSDALE, *Circuit Judge*, PICKERING, *Circuit Judge*, and LYNN, *District Judge*.*

LYNN, *District Judge:*

Continental Airlines, Inc. ("Continental") appeals the district court's grant of summary judgment in favor of Appellee International Brotherhood of Teamsters on Continental's action to vacate an arbitration award under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., which reinstated an employee who was terminated for allegedly violating a "last

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* District Judge for the Northern District of Texas, sitting by designation.

chance agreement" after testing positive for alcohol. For the reasons stated below, the court REVERSES the district court and RENDERS judgment in favor of Continental.

I. FACTS AND PRIOR PROCEEDINGS

The facts relevant to this appeal are as follows. Continental hired Mark Johnson in 1991 as an aircraft mechanic. In August 2000, Johnson reported to work and was subjected to a random alcohol breath test as required by the Department of Transportation. The test established that Johnson had a blood alcohol content ("BAC") of .115, which is above the legal limit for intoxication in Texas. As a result, Johnson was discharged. He subsequently filed a grievance contesting his discharge. To resolve the dispute, Johnson, with the assistance of the International Brotherhood of Teamsters ("IBT"), entered into a "last chance agreement" ("LCA") with Continental. Under the LCA, Johnson was permitted to return to work, provided he satisfied the terms of the agreement. The LCA required that Johnson:

> 1) submit to an evaluation by Continental's Employee Assistance Program ("EAP") director;[1]
>
> 2) complete a course of rehabilitation, if recommended by the EAP director;
>
> 3) submit a letter of resignation to the EAP director to be used to terminate his employment should he fail to satisfy the terms of the agreement or the recommended rehabilitation program;
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> 4) agree he would be terminated if he subsequently failed any drug or alcohol test (test positive for a BAC of .04 or greater);

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[1] Continental notes that its EAP director serves as the company's Substance Abuse Professional ("SAP") for purposes of federal regulations governing transportation employee rehabilitation programs. *See* 49 C.F.R. § 40 (explaining requirements and role of SAP).

5) agree to be subject to random no-notice testing for a set period of time;

6) complete a return to work alcohol test after release by the EAP director.

Pursuant to the terms of the LCA, Johnson met with the EAP director for an evaluation, at which time he was diagnosed with alcohol dependency. He was thus required to complete an outpatient alcohol treatment program, which he did. Prior to returning to work, Johnson entered into an EAP rehabilitation agreement ("EAP agreement") with Continental, which set forth specific terms for his continued employment. The EAP agreement included the following relevant provisions:

1) During the 1-year rehabilitation period/contract, commencing with the date of this Agreement, any use of alcohol or illicit drugs will be considered a violation of this Agreement. This includes mouthwash or other medications/substances which may contain alcohol. If your doctor prescribes medication which contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.

2) You are subject to no-notice testing during the rehabilitation period for not less than 1 year or more than 5 years. The no-notice test screens for 10 drugs, plus alcohol. Failure to report for a test will result in your termination. . . .

4) You are responsible for maintaining contact with the EAP Manager on at least a monthly basis for the purpose of monitoring your progress. . . .

At the time of the EAP agreement, the EAP director orally instructed Johnson to avoid drugs and alcohol, including over-the-counter medications that may contain alcohol. Prior to returning to work, Johnson was given, and passed, an alcohol test.

On March 20, 2001, Johnson left the EAP director a voicemail stating that he was taking over-the-counter cough medicine. Although the EAP director received the message, he never contacted Johnson about it. On March 22, 2001, Continental tested Johnson for alcohol. Johnson tested positive, apparently due to his ingestion of cough medicine. His BAC was .04 at 12:40 p.m. His confirmation test, taken at 1:05 p.m., showed a BAC of .029.

Continental terminated Johnson for consuming alcohol. Johnson filed a grievance protesting his termination. The arbitrators, known as The System Board (the "Board"), consisted of representatives of IBT and Continental and a neutral chairperson. The Board held an evidentiary hearing on Johnson's grievance. A majority of the Board issued an opinion holding that the LCA and the EAP agreement were valid and binding, and that the Board had jurisdiction to determine whether Johnson violated the agreements.[2] The Board concluded that Johnson had not violated the LCA or the EAP agreement and ordered Johnson reinstated.

On March 6, 2003, Continental filed an action against IBT in the Southern District of Texas, seeking to vacate the Board's award. Both parties moved for summary judgment. On January 8, 2004, the district court issued a memorandum opinion and order denying Continental's motion and granting IBT's motion, and upholding the award. On February 9, 2004, the district court stayed the enforcement of the award, pending appeal.

Continental appeals the district court's ruling and seeks vacatur of the Board's award on the grounds that (1) the district court applied the wrong standard of review under the RLA; (2) the district court erred in upholding the award because the Board exceeded its authority, by ignoring the plain

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[2] Continental's Board representative did not sign the opinion. However, the parties do not dispute that the opinion is nevertheless binding on the parties.

language of the agreements and by substituting its judgment for that of the EAP director; and, (3) even if the award were otherwise proper, the district court should have vacated it as violative of public policy.

II. ANALYSIS

This court reviews *de novo* a district court's grant and denial of summary judgment. *Int'l Union of Operating Eng'rs, Local 351 v. Cooper Natural Res., Inc.*, 163 F.3d 916, 918 (5th Cir. 1999).

A. Standard of Review

This court must first determine whether the district court applied the appropriate standard of review in reviewing the Board's award. The RLA governs disputes between airline carriers and their employees, with the stated purpose of avoiding interruptions to commerce that might result from such disputes. 45 U.S.C. § 152. The RLA establishes mandatory procedures for the resolution of both major and minor disputes. *See Consol. Rail Corp. v. Ry. Labor Exec. Ass'n*, 491 U.S. 299, 302-03 (1989). A "major" dispute involves the formation of collective bargaining agreements ("CBAs")—agreements governing rates of pay, rules, or working conditions of employees, as a class. *Id.* at 302. These disputes arise when it is alleged that a CBA is not in place, or when a party seeks to change the terms of an existing agreement; therefore, "'the issue is not whether an existing agreement controls the controversy.'" *Id.* (quoting *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945)). A "minor" dispute arises "out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Id.* at 303. Thus, a minor dispute arises out of the enforcement of an existing CBA. *Id.* Under the RLA, minor disputes must be resolved through binding arbitration before an adjustment board established by the union and the employer. *Id.* Continental and IBT agree that the underlying dispute is a minor dispute under the RLA.

Generally, arbitration awards arising from minor disputes are reviewable by a district court on narrow grounds. Specifically, judicial review is limited to (1) whether the Board failed to comply with the RLA; (2) whether the Board failed to conform or confine itself to matters within the scope of its jurisdiction; and (3) whether the Board's decision was the result of fraud or corruption. 45 U.S.C. § 153, First (q)(2004). Normally, an award is deemed to be within the Board's jurisdiction when it is grounded in the CBA. *See Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989). Absent one of these grounds, an award is binding upon the parties and the findings are conclusive. *Eastern Air Lines, Inc. v. Transport Workers Union*, 580 F.2d 169, 172 (5th Cir. 1978). Unless a court concludes that the Board's interpretation of the contract is "wholly baseless and completely without reason," the Board's interpretation must stand. *Id.* (quoting *Gunther v. San Diego & Ariz. Eastern Ry. Co.*, 382 U.S. 257, 261 (1965)). The Supreme Court has explained that in reviewing a Board's interpretation of a contract,

> a court should not reject an award on the ground that the arbitrator misread the contract . . . . [T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 1987).[3] The district court employed this highly deferential

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[3] While Misco dealt with the review of an arbitration award under the Labor Management Relations Act, this court has cited Misco with approval when setting out the standard of review governing awards under

standard in reviewing the Board's award. Continental argues that because this dispute involved an LCA and because the Board ignored an express term of the agreement, the district court should have reviewed the award under a "no deference" standard, pursuant to this court's decision in *Cooper Natural Resources*.[4] IBT contends that the holding of *Cooper Natural Resources* does not require that awards involving LCAs receive more searching judicial review; i.e., less deference, than awards involving collective bargaining agreements.

In *Cooper Natural Resources*, this court upheld the district court's vacatur of an arbitrator's award, in part because the arbitrator ignored the LCA. The court held that when parties enter into an LCA, "[t]he LCA must be thought of as a supplement to the CBA" which constitutes "the parties' chosen means of dispute resolution," and which is binding on the arbitrator. *Id.* at 919. The court did not state, however, that an arbitrator's decision interpreting an LCA is entitled to any less deference than is one interpreting a CBA, as Continental contends. Continental relies heavily on the statement in *Cooper Natural Resources* that "an arbitrator ignoring the explicit terms of a last chance agreement is owed no deference, and his award must be closely scrutinized." *Id.* However, we conclude that the panel in *Cooper* was not mandating a more stringent standard of review for arbitration awards arising from LCAs than from reviews of CBA determinations.

In *Cooper Natural Resources*, the arbitrator ignored the LCA, relying solely on the CBA. The court in that case was not faced with an issue like that in the present case, where the arbitrator *interpreted* a provision of the LCA and a party challenged the arbitrator's interpretation. Thus, Cooper Natu-

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the RLA. *See American Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 406 (5th Cir. 2003).

[4] The parties treat the EAP agreement as though it were a part of or an addendum to the LCA, which it is. Thus, we treat the EAP and LCA as a part of the same agreement.

ral Resources does not support Continental's position that a more searching review of an arbitrator's interpretation of an LCA is mandated.

Second, none of the authorities relied upon by the court in *Cooper Natural Resources* support a "no deference" standard of review for awards arising from LCAs. In *Tootsie Rolls Indus., Inc. v. Local Union No. 1, Bakery, Confectionary & Tobacco Workers Int'l Union*, 832 F.2d 81 (7th Cir. 1987) (holding that an arbitrator's award should have been vacated), the court applied the same standard of review to an award involving an LCA as it typically applied to awards involving CBAs. Noting that an award under a CBA should be upheld as long as it "draws its essence" from the CBA, the court determined that by basing the award on a company policy outside the applicable LCA, the arbitrator's award did not "draw its essence" from the LCA, and was thus improper. *Id.* at 83-84.

Similarly, in *Coca-Cola Bottling Company of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438 (8th Cir. 1992) (reviewing an arbitrator's award involving an LCA), the court cited the same standard of review identified in Misco, for a CBA, as applicable to awards under LCAs. *Id.* at 1440.

The pre-Misco case of *Bakers Union Factory #326 v. ITT Continental Baking Co.*, 749 F.2d 350 (6th Cir. 1984), which the Sixth Circuit reaffirmed in *Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 786 (6th Cir. 1991), is less explicit than Coca-Cola Bottling; however, the Sixth Circuit appears to recognize that the same deferential standard of review applies to review of an arbitrator's interpretation of an LCA as applies to review of the interpretation of a CBA. In *Bakers Union*, the court addressed the question of whether an arbitrator's award, ignoring the LCA, was properly upheld. The district court cited the general rule that the decision of an arbitrator will not be overturned as long as it derives its

authority from the CBA. Concluding that it did so derive its authority, the district court upheld the award. On appeal, the Sixth Circuit held that while the general rule was as described, the scope of review was broader when the parties entered into an LCA. *Id.* at 353-54. That is what Continental argues for here. While the *Bakers Union* decision speaks of narrow review and broad review, its discussion focuses on the situation where an arbitrator ignores an LCA, as the arbitrator did in *Cooper Natural Resources*. The court was not faced with a situation where an arbitrator's interpretation of an LCA was being challenged. In that situation, the court seemed to recognize that a deferential standard of review would apply: "[A]n arbitrator may determine whether the settlement agreement has, in fact, been breached . . . . Th[is] determination[ ] retain[s] the benefit of a deferential standard of review." *Bakers Union*, 749 F.2d at 356. In light of the facts and holding of *Cooper Natural Resources* and the authority relied upon in it, we hold that the standard of review applicable here is the deferential standard of review articulated by the Supreme Court in *Misco* and employed by the district court below. Therefore, the court rejects Continental's argument that this court is to give no deference to the arbitrator's award.

B. Did the District Court Nonetheless Err in Upholding the Award?

The court must next determine whether, under a deferential standard of review, the district court nonetheless erred in upholding the award. Continental makes two arguments that the award should be vacated, because the Board exceeded the scope of its jurisdiction. First, it argues that the Board ignored the plain terms of the LCA and EAP. Second, it argues that the Board exceeded its authority by substituting its judgment for that of Continental's EAP director.

In order to be within the Board's authority, the award must "draw its essence" from the LCA and EAP. *See Misco*, 484

U.S. at 38. The Board made the following findings and conclusions about Johnson's violations of the LCA and EAP agreement:

> • While Johnson did not visit his physician and receive a written prescription, his doctor's office approved for use over-the-counter cough medicine until he could be seen by his physician.
>
> • Johnson left the EAP director a voicemail informing him that he was taking cough medicine. The director never returned Johnson's call.
>
> • His doctor's approval, while not qualifying as a formal written prescription, "met the letter and spirit" of the EAP agreement. He obtained approval of the medication and promptly notified the EAP director.
>
> • It would have been reasonable for the EAP director to warn Johnson that the use of the cough medicine could potentially violate the agreement.
>
> • The EAP director failed to provide an adequate explanation for his failure to warn Johnson.
>
> • Johnson did not violate the LCA's requirement that Johnson not test positive for the presence of drugs or alcohol in a volume equal to or greater than .04%. The confirmation test taken in March 2001 provided a reading of .029%–well below .04% and insufficient to constitute a violation of the LCA.
>
> • Johnson nonetheless has demonstrated a "pathetic lack of knowledge of and commitment to what it takes to live a life of sobriety" because he could not recall his sobriety date or the first steps of the AA twelve-step program.
>
> • In light of the above, Johnson should be reinstated to his former position and made whole for lost wages and benefits.

Continental argues that these findings reflect that the Board ignored the plain terms of the contract because it (1) ignored the language "doctor's prescription" when it held that the approval of the use of cough medicine containing alcohol by a member of a doctor's staff satisfied the requirements of the EAP agreement, which was incorporated into the LCA agreement, for a doctor's prescription for any medication containing alcohol and (2) it added a "last chance warning" requirement to the EAP agreement and the LCA by determining that the EAP director should have contacted Johnson regarding his voicemail. IBT argues that the award should be upheld because the Board interpreted the LCA and EAP when it made its determination. IBT also argues that the Board's determination that Johnson should have been warned was irrelevant to its award since the Board separately determined that Johnson had not violated the LCA or EAP.

Under *Misco*, an arbitrator's award is to be upheld as long as the arbitrator "is even arguably construing or applying the contract." *Misco*, 484 U.S. at 38. Here, the Board concluded that Johnson was in compliance with the LCA and EAP because he spoke with someone on his doctor's staff and obtained approval from that person to take over-the-counter cough medicine. He then informed the EAP Director via voicemail that he was taking such medication. The record establishes that Johnson contacted his doctor's office to schedule an appointment, that he spoke with a member of the doctor's staff, and that the staff member informed Johnson that the doctor could not prescribe medicine without an appointment, but approved his taking over-the-counter cough medicine until his appointment date. There is no evidence of any kind that Johnson or a member of the doctor's staff spoke with the doctor regarding Johnson's situation, or that the doctor, either directly to Johnson, or indirectly to his staff, instructed Johnson to take over-the-counter cough medicine which contained alcohol. Thus, the uncontested evidence is that Johnson's doctor never approved the use of the cough

medicine he took, either orally or by a formal prescription. Because Johnson's doctor did not prescribe him medicine containing alcohol, his notification to the EAP director, and that person's not calling him back, is irrelevant. The LCA and EAP do not require a call back to Johnson. By failing to require proof of a *doctor's* order, the Board's interpretation effectively reads "doctor" out of the EAP agreement. Such an interpretation is not an arguable construction of the agreements; thus, the Board exceeded the scope of its jurisdiction in fashioning its award.

Accordingly, we hold that the district court erred in upholding the award, and that the award should be vacated. Because we conclude that the Board's interpretation failed to arguably construe the agreements, we need not address two other issues raised by Continental as grounds to vacate the award; i.e., whether the Board otherwise exceeded its authority or whether the award should be vacated on public policy grounds. The judgment of the district court is REVERSED and RENDERED.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's decision granting summary judgment for IBT and upholding the arbitration award, and RENDER summary judgment in favor of Continental, vacating the arbitration award and reinstating Continental's discharge of Mark Johnson.

REVERSED AND RENDERED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20136

CONTINENTAL AIRLINES INC.,
Plaintiff-Counter Defendant-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 11/15/04, 5 Cir., _____, _____ F.3d _____).

Before BARKSDALE, *Circuit Judge*, PICKERING, *Circuit Judge*, and LYNN, *District Judge*.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

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* District Judge for the Northern District of Texas, sitting by designation. Judge King did not participate in the consideration of the rehearing en banc.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-03-0817

CONTINENTAL AIRLINES, INC.,
Plaintiff/Counterdefendant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant/Counterplaintiff.

MEMORANDUM AND ORDER

Pending are Defendant/Counterplaintiff International Brotherhood of Teamsters's Motion for Summary Judgment (Document No. 12) and Plaintiff/Counterdefendant Continental Airlines, Inc.'s Motion for Summary Judgment (Document No. 14). After having carefully reviewed the motions, responses, reply and applicable law, the court concludes as follows:

I. *Background*

This is an action for review and vacation of an arbitral award under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. Plaintiff/Counterdefendant Continental Airlines, Inc. ("Continental") entered into a "Last Chance Agreement" with Defendant/Counterplaintiff International Brotherhood of Teamsters, Inc. ("IBT") regarding Continental employee Mark Johnson ("Johnson"). The Last Chance Agreement settled a then-pending discharge grievance filed by Johnson under the arbitration provisions

contained in the collective bargaining agreement between Continental and IBT.

In August, 2000, Johnson arrived at his maintenance mechanic job legally drunk, having a breath alcohol concentration of .115. Johnson's intoxicated state was discovered through a random test, and Continental terminated Johnson's employment immediately for gross misconduct. Johnson grieved his discharge and, in settlement of the discharge grievance, Continental conditionally reinstated Johnson subject to strict terms of a Last Chance Agreement and with a self-executing resignation letter should Johnson violate the Agreement. In March, 2001, a "no notice" breath test authorized by the Last Chance Agreement established that Johnson was at work with a breath alcohol concentration of approximately .029. Continental contends that the source of Johnson's elevated breath alcohol concentration, namely over-the-counter cough medicine that Johnson took without having first obtained a prescription, violated the terms and conditions of the Employee Assistance Program (EAP). Because the Last Chance Agreement made employment contingent upon successful completion of the EAP, Continental's finding that Johnson violated the EAP triggered its acceptance of Johnson's self-executing resignation letter.

Subject to Continental's objections, Continental's acceptance of Johnson's self-executing resignation letter under the Last Chance Agreement was grieved and the matter was submitted to arbitration under a System Board of Adjustment ("System Board") procedure provided for by the RLA. Specifically, Continental contended that the matter was not grievable and therefore not arbitrable because the Last Chance Agreement was violated, and its express terms bar review of Continental's decision to accept Johnson's self-executing resignation once a violation has occurred. Continental agreed, however, that whether Johnson had violated the Last Chance Agreement was an arbitrable matter, and it

was this issue that was submitted to the System Board. The board found that Johnson had not violated the Last Chance Agreement because the over-the-counter cough medication was approved by his doctor and Johnson had timely notified Continental's EAP regional manager that he was taking the medication. Accordingly, the System Board awarded Johnson's reinstatement.

Continental contends that the System Board's award should be vacated because (1) Continental's acceptance of Johnson's resignation letter is not grievable under the terms of the Last Chance Agreement; (2) the System Board exceeded its authority by substituting its own language and/or interpretation of the terms of the Last Chance Agreement in place of the language of the parties, including the "last chance" terms of the Agreement; (3) the System Board exceeded its authority and competency by substituting its judgment for the judgment and personal discretion of the Employee Assistance Program ("EAP") as agreed upon by the parties; and (4) the System Board's award of reinstatement to Johnson violates public policy.

IBT counterclaims that Continental's ongoing refusal to abide by and comply with the System Board's award violates the RLA and the parties' collective bargaining agreement. IBT seeks entry of a permanent injunction directing Continental's full and continued compliance with the award. Both Continental and IBT move for summary judgment.

II. *Summary Judgment Standard of Review*

Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "demonstrate the absence of a genuine

issue of material fact." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *Id.* "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Id.*

In considering a motion for summary judgment, the district court must view the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986). All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993) (citing *Matsushita*, 106 S. Ct. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson*, 106 S. Ct. at 2513.

III. *Discussion*

A. *Review Under the RLA*

The RLA, which governs disputes between airline carriers and its employees, was intended "to promote stability in labor-management relations by providing a comprehensive

framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2243 (1994). The heart of the RLA is the duty imposed on carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First; *see also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 89 S. Ct. 1109, 1115 (1969). To this end, the RLA establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes. *Norris*, 114 S. Ct. at 2243-44. One class involves the formation of collective bargaining agreements or efforts to secure them. These are deemed "major" disputes. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989). The second class of disputes "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151A(5). These are known as "minor" disputes. *Consolidated Rail*, 109 S. Ct. at 2480. Stated differently, "major disputes seek to create contractual rights, minor disputes to enforce them." *Id.*

The parties agree that Johnson's wrongful discharge grievance was a "minor" dispute within the terms of the RLA. Such disputes must be resolved through binding arbitration. *Andrews v. Louisville & Nashville R.R. Co.*, 92 S. Ct. 1562, 1564 (1972). The scope of judicial review of decisions of arbitration panels like the system board is "among the narrowest known to the law." *Anderson v. Nat'l R.R. Passenger Corp.*, 754 F.2d 202, 203 (7th cir. 1984) (citing *Union Pacific R.R. v. Sheehan*, 99 S. Ct. 399, 401 (1978), *reh'g denied*, 99 S. Ct. 1060 (1979)). Under the RLA, judicial review is limited to three specific areas: (1) failure of the System Board to comply with the requirements of the Railway Labor Act; (2) failure of the System Board to

conform, or to confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption.[1] 45 U.S.C. § 153 First (q).

If Continental's objections do not fall within any of these categories, the findings and order of the System Board are conclusive and may not be set aside. *Andrews*, 92 S. Ct. at 1565. *See also Diamond v. Terminal Ry. Ala. State Docks*, 421 F.2d 228, 233 (5th Cir. 1970) ("[T]he findings and order of the Board are 'conclusive,'" and the courts "may not substitute their judgments for those of the Board divisions."). In *Sheehan*, the Supreme Court articulated this policy underlying the Railway Labor Act:

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.

Sheehan, 99 S. Ct. at 402 (internal citations omitted). "[T]he courts play only a limited role when asked to review the decision of an arbitrator" and "are not authorized to recon-

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[1] Although the Fifth Circuit recognizes a judicially created fourth exception when the Board denies a litigant constitutional due process, *Brotherhood of Locomotive Engineers v. St. Louis Southwestern Ry. Co.*, 757 F.2d 656, 661 (5th Cir. 1985), Continental is asserting no such claim in this case.

sider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 370 (1987).

B. *Failure of the System Board to Conform or Confine Itself to Matters Within the Scope of Its Jurisdiction*

In this case, Continental contends that the System Board exceeded its jurisdiction by (1) arbitrating the matter despite the waiver contained in the Last Chance Agreement; and (2) finding that Johnson did not violate the Last Chance Agreement and, as a result, awarding him reinstatement. To be found not in excess of the arbitration board's jurisdiction—and therefore enforceable—an award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 121 S. Ct. 462, 466 (2000) (quoting *Misco*, 108 S. Ct. at 370, 371). *See also Houston Lighting & Power Co. v. International Bhd. Of Elec. Workers*, 71 F.3d 179, 182 (5th Cir. 1995); *Diamond*, 421 F.2d at 233.

An arbitral award "draws its essence from" an agreement if it

> "ha[s] a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the . . . agreement . . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract." Phrased another way, the question is whether the arbitrator's award "was so unfounded in reason and fact, so unconnected with the wording and purpose of the . . . agreement as to 'manifest an infidelity to the obligation of an arbitrator.'"

Executone Info. Sys. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994) (quoting *Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), *cert. denied, 90 S.*

Ct. 564 (1970)). In conducting the "essence" inquiry, "courts are bound to interpret the arbitrator's award and the contract broadly so as to uphold the award." *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72, 74 (5th Cir. 1987); *see also International Ass'n of Machinists & Aerospace Workers v. Texas Steel Co.*, 538 F.2d 1116, 1121 (5th Cir. 1976) (5th Cir. 1976) ("The 'essence' standard is to be interpreted expansively so as to uphold the award, rather than restrictively."), *cert. denied*, 97 S. Ct. 1110 (1977).

1. Grievability and Arbitrability of Johnson's Discharge

Continental argues first that the System Board exceeded its jurisdiction by determining that Johnson's discharge under the Last Chance Agreement was both grievable and arbitrable. The Last Chance Agreement provides that:

> 4. Johnson's continuing employment shall be conditional upon his compliance with all of the following conditions:
>
> . . .
>
> vi. If Johnson fails to comply with the provisions of the conditions of his continuing employment, termination will result, and his right to challenge such termination through the grievance process shall be waived. No grievance of the matter shall be waived. No grievance of the matter shall be permitted.
>
> . . .
>
> 7. Johnson acknowledges that he will have no right to file a grievance concerning [Continental's] acceptance and execution of his letter of resignation and/or termination.

Id. ex. D, at 2. Although Continental now contends that these provisions of the Last Chance Agreement foreclose Johnson's ability to arbitrate his discharge, Continental maintained

during the arbitration proceedings that the question of whether or not Johnson *violated* the Last Chance Agreement—as distinguished from his automatic termination if there was a violation—is arbitrable:

> The Company's position is that Mr. Johnson's grievance over his termination, if couched in terms of the Collective Bargaining Agreement, is inarbitrable. There is not a question of just cause that exists and Mr. Johnson has expressly agreed to waive any right to grieve under the Collective Bargaining Agreement. *The only arbitrable question is whether or not Mr. Johnson violated any of the terms of his agreement with the Company. Clearly he has a right to some forum for the determination of his dispute over the actions taken by the Company.*

Id. ex. B, at 10:9-20, spoken by Continental's representative at Arbitration (emphasis added). The parties, therefore, were in agreement before the System Board that the waiver provisions of Last Chance Agreement do not preclude arbitration of whether Johnson violated the terms of the Agreement. Given Continental's representations to the System Board that the matter is arbitrable under the terms of the Last Chance Agreement, the Court cannot now find that the Board's act in taking jurisdiction of the matter does not "draw its essence" from the Agreement or is "without foundation in reason or fact." Parties are allowed to present their interpretations of contractual provisions to shed light on the purpose of the agreement, and a fact-finder, such as an arbitrator, is well within his authority to give those interpretations weight. *See United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990) (citing *Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154, 156 (5th Cir. 1982)). *See also Executone*, 26 F.3d at 1325 (An award is enforceable if it "ha[s] a basis that is at least rationally inferable, if not obviously drawn, from the

letter or purpose of the . . . agreement.") (emphasis added). Accordingly, the System Board's award will not be vacated on the ground that Johnson's alleged violation of the Last Chance Agreement is inarbitrable.

2. Findings of the System Board

Continental next challenges the System Board's finding that Johnson did not violate the Last Chance Agreement by using an over-the-counter cough medication and then informing Continental that he was taking the medication. The EAP's "Alcohol/Drug Rehabilitation Agreement"—Johnson's compliance with which is a condition of his continuing employment under the Last Chance Agreement—provides that:

> 1. During the 1-year rehabilitation period/contract, commencing with the date of this Agreement [November 10, 2000], any use of alcohol or illicit drugs will be considered a violation of this Agreement. This includes mouthwash or other medications/substances which may contain alcohol. If your doctor prescribes medication which contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.

Document No. 15 ex. C, at ¶ 1. At the arbitration, Continental argued that Johnson's call to Steve Skidmore, Continental's EAP regional manager, to inform him that Johnson was taking cough medication did not excuse him from using any alcohol because he "never informed Continental that he was taking medication that contained alcohol." *Id.* ex. A, at 15. The System Board disagreed and held, based on the uncontroverted testimony presented at the arbitration:

> Granted that the Grievant's doctor did not "prescribe" the particular medication in the technical sense that it involved a written prescription medication requiring the

> services of a licensed pharmacist. Neither did his doctor "prescribe" a particular brand of cough medication. The fact that the doctor approved the use of a cough medicine, however, surely means that the Grievant did not take it upon himself to somehow circumvent the purpose of the Last Chance requirements by unsupervised self-medication.

Id. In light of these factual findings and its interpretation of the word "prescribes," the System Board found that Johnson did not violate the Alcohol/Drug Rehabilitation Agreement, and therefore he did not violate the Last Chance Agreement, stating "the Grievant fully met the letter and the spirit of Paragraph 1, as quoted above, both by securing his doctor's approval for the cough medication and then by promptly notifying his EAP representative Skidmore 'of such medication.'" *Id.*

The Supreme Court has established that courts must be deferential to an arbitrator's findings concerning contractual interpretation:

> To resolve disputes about the application of a[n] . . . agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract . . . . [T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. *But as long as the arbitrator is even arguably construing or applying the contract and acting within*

> *the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.*

Misco, 108 S. Ct. at 370-71 (internal citations omitted) (emphasis added). Thus, even if the Court agrees with Continental's contention that the System Board's construction of the word "prescribe" was so broad as to be erroneous, it cannot disturb the System Board's award on that basis. *See id.*; *United Food & Commercial Workers v. National Tea Co.*, 899 F.2d 386, 388-89 (5th Cir. 1990) .(where arbitrator's award was based on the interpretation of an ambiguous contract provision, a court's conclusion that the interpretation was incorrect was insufficient to vacate the award; quoting *Misco*, the court held that "[c]ourts will not disturb a labor arbitrator's award on the ground that it is based upon 'improvident, even silly, factfinding'" or a misreading of the contract).

Continental argues further that the System Board's award of reinstatement to Johnson should be vacated because the Board imposed an additional "last chance" warning by the EAP representative, not contracted for by the parties, for over-the-counter medicines containing alcohol. An arbitration board's award is unenforceable if it "imposes additional requirements that are not expressly provided in the agreement." *American Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 197 F. Supp. 2d 580, 585 (N.D. Tex. 2002) (citing *Airline Prof'ls Ass'n v. ABX Air, Inc.*, 274 F.3d 1023, 1030 (6th Cir. 2001)), *aff'd*, 343 F.3d 401 (5th Cir. 2003). In this case, however, the System Board found that Johnson did not violate the Last Chance Agreement and that Continental therefore could not accept Johnson's self-executing resignation letter. This is not a case where the System Board found that Johnson violated the Agreement—which would permit Continental to accept the resignation letter and terminate him in accordance with the Agreement—but then

excused his violation and prevented his termination by imposing the additional requirement for a warning from the EAP representative. *Cf. id.*, 197 F. Supp. 2d at 586 (finding that the reinstatement of an airline pilot exceeded the panel's jurisdiction by imposing a hearing requirement *despite a determination by the panel that good cause existed for the pilot's termination*). Instead, the System Board concluded, as a matter separate from its findings on Johnson's compliance with the Last Chance Agreement, that Continental acted unreasonably through Skidmore's failure to communicate with Johnson regarding the cough medication. *See* Document No. 15 ex. A, at 15 ("It would have been eminently reasonable for Skidmore to have returned the Grievant's call in order to warn him that taking the medication would violate the Agreement and cost him his job, *if in fact that were the case*." (emphasis added). This finding may have lent support to the System Board's conclusion that Johnson's termination was improper, but it could not have been a basis for excusing any violation of the Last Chance Agreement by Johnson since the Board had already found that Johnson did not violate the Agreement. Accordingly, the System Board's award will not be vacated on these grounds.

C. *Public Policy*

Finally, Continental argues that the System Board's award of reinstatement should be vacated as contrary to public policy. Although the Fifth Circuit has declined to reach this issue, *see Atchinson, Topeka & Santa Fe Ry. Co. v. United Transp. Union*, 175 F.3d 355, 358 (5th Cir. 1999), several circuits have held that a court may overturn an arbitral award under the RLA if the award contravenes public policy. *See, e.g., Union Pacific R.R. Co.*, 3 F.3d 255, 261 (8th Cir. 1993) (specifically holding that precedent concerning public policy review under the National Labor Relations Act applies as well to the RLA); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 669-71 (11th Cir. 1988) (assuming

without discussion that public policy review is available under the RLA); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 83-84 (D.C. Cir. 1987) (same).

However, like the court found in *Atchinson*, even if Continental is correct that there is a well-defined public policy against reinstating an alcohol abuser to a safety-sensitive position in the airline industry, the System Board's decision would not violate that policy. Because the Board found that Johnson had complied with the terms and conditions of the EAP, it did not conclude that Johnson had in fact abused alcohol in violation of the Last Chance Agreement. This is not a case in which a System Board, after finding or not questioning that an employee used drugs or alcohol in violation of company policy, nonetheless ordered the employee reinstated to a safety-sensitive position, as might require public policy review. *Atchinson*, 175 F.3d at 358. *Cf Union Pacific*, 3 F.3d at 262-63 (refusing on public policy grounds to enforce an award reinstating a safety-sensitive employee whose due process rights were violated at his hearing but who nonetheless was found to have violated his company's alcohol regulation); *Delta Air Lines*, 861 F.2d at 668, 674 (refusing on public policy grounds to enforce an award reinstating an airline pilot where the adjustment board found that the pilot in fact had flown a plane while drunk). In sum, although the Court finds extremely troubling the System Board's finding that Johnson did not violate the Last Chance/Rehabilitation Agreements, as well as its observation that Johnson "shows a pathetic lack of knowledge of and commitment to what it takes to life a life of sobriety," Document No. 15 ex. A, at 17, the Court has no authority to vacate the award of Johnson's reinstatement given the Board's *conclusive* finding that Continental "[fell] short of proving that the Grievant violated the Last Chance/ Rehabilitation Agreements." *Id. See Atchinson*, 175 F.3d at 358.

IV. *Order*

Based on the foregoing, it is

ORDERED that Defendant/Counterplaintiff International Brotherhood of Teamsters's Motion for Summary Judgment (Document No. 12) is GRANTED, and Plaintiff/Counterdefendant Continental Airlines, Inc.'s Motion for Summary Judgment (Document No. 14) is DENIED. It IS FURTHER

ORDERED that Plaintiff/Counterdefendant Continental Airlines, Inc. forthwith and no later than thirty (30) days after entry of this Order, shall comply with the arbitral award of February 7, 2003, requiring Mark A. Johnson's reinstatement to his former position, still subject to the Last Chance agreements that the System Board found to be valid and binding, and payment to him of all lost wages and benefits attributable to his discharge. *See* Document No. 15 ex. A, at 13-14, 17.

SO ORDERED.

The Clerk shall notify all parties and provide with a true copy of this Order.

SIGNED at Houston, Texas, on this 7th day of January, 2004.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

CONTINENTAL AIRLINES—INT'L BROTHERHOOD OF TEAMSTERS
SYSTEM BOARD OF ADJUSTMENT
Grievance No. CAL-IBT 01-020
Dan O'Connor, Company Board Member
James Hicks, Jr., Union Board Member

IN THE MATTER OF ARBITRATION BETWEEN

Mark Johnson, Grievant

CONTINENTAL AIRLINES AND
INT'L BROTHERHOOD OF TEAMSTERS

SYSTEM BOARD CHAIR: John J. Flagler
1812 Mount Curve Avenue
Minneapolis, MN 55403

DATE AND PLACE OF HEARING:
September 24 &
November 5, 2002

DATE OF RECEIPT OF BRIEFS:
January 10, 2003

APPEARANCES

FOR THE COMPANY: Jeffrey D. Wall
Continental Airlines, Inc.
1500 Smith Street, HQSHR
Houston, TX 77002

FOR THE UNION: James L. Hicks, Jr.
2777 North Stemmons Freeway,
#1100
Dallas, TX 75207

ISSUES

1. Is the issue of the validity of the Last Chance Agreements arbitrable? If so,

2. Are the Last Chance or Rehabilitation Agreements valid and binding? If so,

3. Did the Grievant violate any terms of the Last Chance or Rehabilitation Agreement? If not,

4. What shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 14

Part 5—Consequent of a Positive Alcohol Test

A. When an employee's breath alcohol test indicates an alcohol concentration between 0.02 and 0.039, he shall be retested no sooner than fifteen (15) minutes from the administration of the initial test. If the second test also indicates an alcohol concentration between 0.02 and 0.0339, the employee shall not be permitted to resume maintenance duties until either eight (8) hours have elapsed since the original test, or his breath alcohol test indicates an alcohol concentration of less than 0.02. If the second test indicates an alcohol concentration below 0.02, the test shall be considered negative, and the employee shall be permitted to resume maintenance duties.

B. An employee whose breath alcohol test indicates an alcohol concentration between 0.02 and 0.039 twice within eighteen (18) months shall thereafter be subject to no notice alcohol testing for a period of twelve (12) months from the time of the second such test.

C. If an employee's breath alcohol test indicates an alcohol concentration of 0.04 or greater, he shall be required, as a condition of continuing employment, to undergo evaluation by Continental's EAP Director, or the director's designee and to complete any rehabilitation recommended by EAP prior to resuming any maintenance duties. Such rehabilitation shall be funded entirely by the employee, except that he shall not be precluded from using any insurance benefits to which he is otherwise entitled. In addition, he shall be subject to no notice alcohol testing for a period of five (5) years from the date of this completion of the formal rehabilitation program. Thereafter the employee will not be subject to further no notice testing relating to the rehabilitation.

D. If at any time during the balance of the employee's career he has a breath alcohol test indicating an alcohol concentration of 0.04 or greater, he shall be forever barred from working as a Technical Services employee for Continental, or from performing any other safety sensitive duties at Continental.

Part 6—No Notice Testing

A. No notice is drug and/or alcohol testing administered by the Company in aid of rehabilitation as described elsewhere in this Part. Employees will be subject to no notice testing under each of the following circumstances:

1. The employee has submitted to a rehabilitation program requiring no notice testing.

2. A System Board of Adjustment has directed no notice testing.

3. The employee has had a previous verified confirmed positive drug test result, a breath alcohol

test indicating an alcohol concentration of 0.04 or greater, or two breath alcohol tests indicating an alcohol concentration between 0.02 and 0.039 within eighteen (18) months.

B. During the period an employee is subject to no notice testing, the company may require no notice drug and/or alcohol testing as frequently as it deems necessary or advisable.

C. No notice testing may be conducted just before, during, or just after any on duty period.

ARTICLE 21-4

L. It is understood and agreed that all formal agreements, amendments, deletions and additions to this Agreement must be approved by the Director of the Airline Division—International Brotherhood of Teamsters and the senior corporate officer in the human Resources Department for the Company.

FACTS

The Grievant began employment with Continental Airlines on September 6, 1990. At the time of his separation from employment, the Grievant was employed as a Technician in Aircraft Maintenance in Houston, TX. Technicians working in Aircraft Maintenance perform safety-sensitive functions that directly affect the safety of the aircraft and its passengers.

On August 18, 2000, the Grievant reported to work and tested positive for alcohol on a Department of Transportation ("DOT") random drug and alcohol screen with an alcohol concentration of .115; rendering him legally intoxicated in Texas, where legal intoxication is defined as having an alcohol concentration of .08 or greater. The Grievant was then removed from duty pending a full investigation.

After considering all pertinent facts, the Grievant was terminated on August 21, 2000, for engaging in gross misconduct by reporting to work legally drunk. The Grievant then filed a grievance contesting his termination. In order to resolve the grievance, the Grievant was offered conditional reinstatement on September 5, 2000, pursuant to a Last Chance Agreement. Prior to execution of the Last Chance Agreement, the IBT requested and was afforded an opportunity to review the agreement with counsel. After reviewing the Last Chance Agreement with legal counsel, the Grievant and the IBT through its local business agent, Mike Bell, signed and executed the Lat Chance Agreement.

The Grievant's continued employment was conditioned upon compliance with all terms and conditions of the Last Chance Agreement, terms and conditions of the Grievant's Last Chance Agreement include the following:

1. Submit to an initial evaluation by Continental's EAP Director or Director's designee.

2. Successfully complete the course of rehabilitation recommended by Continental's EAP, including all terms and conditions attached to such course of rehabilitation.

3. Execute and deliver to the EAP Director an undated letter of resignation to be used to terminate his employment should he fail to satisfy any terms of this Agreement or of the rehabilitation directed by EAP.

4. During the remainder of his career with Continental should Johnson subsequently fail any drug or alcohol (.04 or greater) test, the undated letter of resignation will be accepted by the Company, and his employment severed.

5. Failure to comply with the provisions of his continuing employment, termination will result, and his right to challenge such termination through the grievance process shall be waived.

6. He acknowledges that he will have no right to file a grievance concerning the Company's acceptance and execution of his letter of resignation and/or termination of employment.

7. Johnson and the IBT agree to withdraw the grievance contesting Johnson's termination.

Pursuant to the terms of the Last Chance Agreement, the grievant was referred to EAP for an evaluation and assessment. The Grievant was diagnosed with alcohol dependency and was required to complete an alcohol dependency treatment program. The Grievant rejected in-patient treatment and elected out-patient treatment, because he wanted to continue working his part-time job.

As a condition of the Last Chance Agreement, the Grievant also entered into an EAP Alcohol/Drug Rehabilitation Agreement on November 10, 2000, conditioning the Grievant's continued employment upon satisfactorily completing the terms of this Agreement. Prior to execution, EAP Manager, Steve Skidmore, and the Human Resources Manager, Jody Herrera, reviewed and explained each term of the Agreement with the Grievant. Skidmore specifically advised the Grievant about "staying away from drugs and alcohol including over-the-counter mediations which may contain alcohol." The Grievant asked Skidmore specifically about cough syrups and Skidmore told the Grievant "to be careful, read the labels, and to make sure he knew what he was taking." He also told the Grievant "it was his responsibility to be sure that any medications that he took at that time did not contain alcohol." The Grievant then signed the

EAP Alcohol/Drug Rehabilitation Agreement and agreed to comply with the following terms:

1. During the one-year rehabilitation period, commencing on the date of the Agreement, any use of alcohol or illicit drugs will be considered a violation of the Rehabilitation Agreement. This includes mouthwash or other medications/substances which may contain alcohol. If your doctor prescribes medication that contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.

2. You are subject to non-notice testing during the rehabilitation period. The no-notice test screens for 10 drugs, plus alcohol.

3. Violation of the Rehabilitation would result in termination of employment without recourse to the grievance process.

In addition to the Company's no-notice testing, the Grievant was also subject to DOT follow-up testing based upon his initial DOT positive alcohol test. DOT follow-up testing is administrated and scheduled by the Company's substance abuse professional. Skidmore scheduled the Grievant's DOT follow-up testing and his no-notice testing was scheduled by the no-notice scheduler, Tony Rue. From November 2000 through March 2001, the Grievant participated in 11 no-notice tests and 2 DOT follow-up tests for a total of 13 drug and alcohol tests.

Skidmore testified that the Grievant left a voice message on March 20, 2001, stating "he was taking cough medicine." The Grievant testified that he left a voice message for Skidmore that he was taking "Safeway brand cough medicine." The Grievant never told Skidmore the cough medicine contained alcohol. On March 22, 2001, after entering into valid Last Chance and EAP Rehabilitation Agreements, the Grievant Tested positive on a Company no-notice test for

alcohol with a blood alcohol concentration of .040 on the initial screen performed at 12:40 p.m. Approximately 15 minutes after the initial screen, the Alcomitor prompted the tester to begin the confirming test. At 12:58 p.m., a confirming test was performed and the Grievant failed to provide a sufficient breath sample for the test after making two attempts. At 13:00, another test was attempted and the Grievant tested positive with an alcohol concentration level of .030. At 13:05, a confirming test was performed and the Grievant again tested positive with an alcohol concentration level of .029.

On March 23, 2001, the Company accepted and effectuated the Grievant's letter of resignation based upon the Grievant's violation of the Last Chance and Rehabilitation Agreements by using alcohol.

POSITION OF THE COMPANY

The only arbitrable issue is whether the Grievant violated any term of the agreements. The parties entered into a binding Last Chance Agreement pursuant to Article 14(B)(1) of the CBA conditionally reinstating the Grievant After terminating him for a positive alcohol test. In exchange for reinstatement, the Grievant signed an undated latter of resignation agreeing that the undated letter would be signed and effectuated by the Company in the event he failed to satisfy any term of the Last Chance Agreement or EAP's course of rehabilitation. In Section 8 of the Last Chance Agreement, the Grievant also expressly waived his right to file a grievance concerning the Company's acceptance and execution of his letter of resignation and/or termination of his employment. Additionally, the Grievant expressly agreed to abide by the terms of EAP's Rehabilitation Agreement and agreed that any violation of the Agreement would result in termination of his employment without recourse to the grievance process. The Grievant entered into valid Last Chance and EAP Rehabilitation Agreements agreeing to

abide by the terms of the Agreement in order to maintain employment and expressly waiving any right to grieve. There is no question of just cause that exists under the CBA. The terms of the Last Chance and Rehabilitation Agreements, and not the just cause standard, control in this case. The only arbitrable issue remaining is whether or not the Grievant violated any term of either the Last Chance or Rehabilitation Agreement. If so, the Agreements are self-executing.

The Last Chance Agreement is valid and binding, and the Union and Grievant should be estopped from challenging its terms. The Union's challenge to the Last Chance Agreement has no merit. Neither the Union nor the Grievant were coerced, or compelled, or deceived to sign the Agreement. They did so after consulting with legal counsel, and without objecting to its terms. The Agreement settled an existing grievance, and in reliance on its covenants, the Company reinstated the Grievant's employment. The Company's reliance to its detriment (the continued employment of an employee guilty of misconduct and the expenditure of its resources on the Grievant's rehabilitation, EAP counseling, and continued drug and alcohol testing) on the promises made by the Union and Grievant should estop those parties from challenging the terms or validity of the Last Chance Agreement. Continental performed its promises, the Grievant failed to perform his; and the Union—at arbitration—now attempts to evade its commitments. The Board should not permit that to occur.

The terms and conditions of the Last Chance Agreement are clear and unambiguous. The penalty for violating the Agreement is expressly stated therein—the Company will accept and execute the Grievant's letter of resignation terminating his employment with the company with no recourse to grieve the Company's execution of his resignation. Where the penalty for violation of the Agreement is specified, the role of the arbitrator is to determine only whether the

Grievant violated the Last Chance Agreement. Since the penalty is clearly established by the Last Chance Agreement in this case, the Arbitrator has no authority to amend the terms of that Agreement.

The Union argues that the Last Chance Agreement violates the CBA because it imposes terms that exceed the CBA. The Union asserts that the IBT Business Agent Mike Bell exceeded his authority by executing the Last Chance Agreement because it constitutes an amendment to the CBA. Whether or not the Last Chance Agreement violates the CBA is not the subject matter of the grievance and it not properly before this Board. The Board lacks subject matter jurisdiction to hear and decide such an issue.

The Grievant violated the Last Chance and EAP Rehabilitation Agreements by ingesting alcohol. The Rehabilitation Agreement clearly prohibits the use of any alcohol including medications or substances containing alcohol. It is undisputed that the Grievant tested positive for alcohol on March 22, 2001. By testing positive for alcohol, the Grievant failed to complete EAP's course of rehabilitation and violated the terms of the Last Chance and Rehabilitation Agreements.

The Union erroneously argues that the Grievant did not violate the Agreements because he did not maintain a blood alcohol content level .04 or above. The Union is simply wrong in their assertion. The Rehabilitation Agreement clearly states, "any use of alcohol including medications/ substances that may contain alcohol will be considered a violation of the Agreement." Any use of alcohol is strictly prohibited during the Grievant's course of rehabilitation because it could result in relapse. The Grievant also claimed that he did not violate the Agreements because he contacted EAP and notified Skidmore that the was taking cough medicine. Notifying EAP that he was taking "cough medication" does not excuse the Grievant from his obligation to refrain from using any alcohol and it does not invalidate or cancel his

positive alcohol test result. He never informed Continental that he was taking medication that contained alcohol. He knew he was precluded form using medications containing alcohol and he elected to do so anyway in violation of the Agreements.

The Grievant admits to using alcohol claiming that his positive alcohol test was a result of his doctor's recommended use of over-the-counter cough medication. He also asserted that he did not know that the cough medicine he consumed contained alcohol. The reasons why he consumed the cough medication containing alcohol would only be relevant if he maintained a valid medical prescription, which he did not. Moreover, the Grievant testified that he asked the doctor if he could use cough medication and the doctor answered affirmatively. The doctor never directed the Grievant to use cough medications as the Grievant suggests. The Grievant's story of using cough medication is clearly an attempt to conceal his use of alcohol and does not excuse him from complying with the terms of the Agreements.

Although the Grievant claims that he did not know the cough medication contained alcohol, the evidence demonstrates otherwise. If the Grievant did not know the cough medication contained alcohol why did he attempt to notify EAP? Clearly, the Grievant knew or at the very least suspected that the cough medication contained alcohol. Skidmore testified that some cough medications contain approximately 25-50% alcohol. As a diagnosed alcoholic expressly prohibited from using any form of alcohol, reason would dictate that the Grievant simply review the ingredient level to determine whether the cough medication contained alcohol, just as Skidmore specifically told him.

The Grievant continued to lie and change his story throughout the entire hearing. He initially testified that his sobriety date was September 5, 2000. Then on cross-examination his wife testified that it was September 15, 2000,

but the Grievant admitted to his psychiatrist, Dr. Blass, that he consumed alcohol on September 17, 2000. Therefore, his sobriety date could not have been earlier than September 17, 2000. The Grievant could not even recite one Step of the 12-Step Treatment Program. The Grievant was not in recovery because alcoholics in recovery are expected to know their sobriety date and at least the first three steps of the 12-Step Program. The Grievant's claim of purchasing Safeway brand cough medicine from Randall's is further evidence of the Grievant's web of lies. Obviously, Randall's would not sell Safeway brand products; they would sell their own brand. Initially, he testified he saved the bottle, and then he testified he didn't know if he saved the bottle, but he never produced it. The Grievant also testified under oath that he was subjected to alcohol testing two to three times per week., however, the evidence clearly demonstrates that from November 2000 through March 2001, the Grievant was only tested a total of 13 times. The Grievant lacks credibility and his testimony should be given no weight.

Skidmore, a trained substance abuse specialist, testified that alcoholics often consume mouthwash to conceal their consumption of alcohol. Additionally, he testified that consumption of cough mediation at the rate alleged by the Grievant would not result in a positive breath alcohol test based upon generally accepted alcohol metabolism principles.

The Union claims that the Grievant did not violate the Last Chance Agreement because the Medical Review Officer ("MRO") never reviewed his alcohol test result. Contrary to the Union's claim, the MRO does not evaluate alcohol tests performed under the Company's no-notice testing program. A Medical Review Officer or MRO is a physician designated to interpret the results of drug testing under the DOT drug-testing program. The Union then claimed that the Grievant did not violate the Agreements because he was not afforded a blood alcohol test. Article 14, Part 3 only provides that an

employee may request a blood test; it does not preclude the Company from taking action based upon a confirmed positive alcohol breath test. The only evidence of such a request is the Grievant's unreliable, uncorroborated testimony.

The undisputed evidence demonstrates that the Grievant committed a serious violation of the Last Chance and Rehabilitation Agreements by using alcohol. In doing so, he subjected himself to termination as prescribed under the Last Chance Agreement. The purpose of drug and alcohol testing is to ensure that the safety of our airline operations, the traveling public, and our employees is not compromised by alcohol and drug use. He elected to consume alcohol and compromised the Company's ability to safely operate the airline. The penalty has been settled by the Agreements and the Grievant must be held accountable.

The Union presented a series of Last Chance Agreements claiming that the Grievant was treated separately because his Agreement contained more onerous terms than other employees. The Union failed to present any of the facts or circumstances surrounding these agreements and many of the terms contained in Union Exhibits 3-6 are also contained the Grievant's Last Chance Agreement. A claim of disparate treatment is an affirmative defense; therefore, the union bears the burden of proof. In order to sustain a claim of disparate treatment, the Union must produce evidence that the Grievant did not receive the same degree of discipline as all other "similarly situated" employees engaged in similar acts of misconduct without any reasonable basis for the variation in discipline. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his offense were substantively like those of individuals who received more moderate penalties. The Union produced no evidence of a similarly situated employee engaged in similar acts of misconduct receiving a different penalty. The Company administers discipline in a

fair and consistent manner considering the circumstances and severity of the conduct involved in each case.

POSITION OF THE UNION

Continental is of the view that the grievance before the arbitrator is not arbitrable; however, Continental concedes that the arbitrator has the authority to determine whether the Grievant, Mark Johnson, violated the terms of the Agrements he made with the Company (Company Exhibits 1 and 2).

Continental contends that Johnson violated paragraph 1 of the Company Exhibit 2 which provides:

> During the one year rehabilitation period/contract, commencing with the date of this agreement, any use of alcohol or illicit drugs will be considered a violation of this Agreement. The includes mouthwash or other medication substances which may contain alcohol. If your doctor prescribes medication which contains alcohol/ narcotic drugs, you are required to inform the EAP staff of such medication.

The uncontested and credible facts show that on approximately March 20, 2001, the Grievant called his doctor for an appointment. An appointment could not be properly made and accordingly, the doctor recommended/prescribed that the Grievant should use an over-the-counter cough syrup until he could be seen by the doctor. That medication contained alcohol and the Grievant therefore attempted to contact his EAP representative, Steve Skidmore. Skidmore was out of town and did not return the Grievant's call. These facts demonstrate that the Grievant complied with the above recited portion of Company Exhibit 2.

At the beginning of the hearing, Company counsel contended that the Grievant's assertion that he contacted the EAP was demonstrably false. Surprisingly, EAP representative, Skidmore, confirmed the Grievant's testimony. Regardless,

Company's counsel also conceded that if Johnson contacted EAP about the medication, he should not have been tested at all. For this reason as well, the March drug test should be voided and a determination that the Grievant did not violate the provisions of Company Exhibit 2 should be issued.

Company Exhibit 3 in relevant part provides:

> During the remainder of his career with Continental, should Johnson subsequently fail any drug or alcohol (.04 or greater) test, the undated letter of resignation will be accepted by the Company and his employment severed.

When the Grievant was tested in March of 2001, his confirmed test result was in each case less than .04. Not having had a test result at or above .04, the Grievant did not violate the provisions of Company Exhibit 2.

As demonstrated above, even from the perspective of what Continental contends is before the Arbitrator, it is clear that the Grievant did not violate his agreement with Continental. He should be ordered reinstated with full back pay, seniority and benefits.

From the perspective of the Union, even the issue suggested by Continental should not be reached by the Arbitrator because in several very important respects, Johnson was, in the handling of his drug testing, denied entitlements provided by the Collective Bargaining Agreement.

First, when the Grievant in August of 2000 failed to test for alcohol detection, he should not have been terminated. Article 14, Part 5(C) provides "If an employee's breath alcohol test indicates an alcohol concentration of .04 or greater, he shall be required, as a condition of continuing employment, to undergo evaluation by Continental's EAP Director . . . etc." Only if the employee refuses is he to be terminated. Entry into EAP program for an employee failing

an alcohol test is an entitlement under the Collective Bargaining Agreement and does not require Continental's permission.

All that the contract requires of an employee failing an alcohol test is that he meet the requirements of Part 5(C). Contrary to the contract, Continental, instead, terminated the Grievant and forced him to sign Company Exhibits 2 and 3 in order to enter the EAP program and be returned to work. Union contends that Continental's action in requiring the Grievant to sign Company Exhibits 2 and 3 violated the Collective Bargaining Agreement and should be deemed void.

Further, certain provisions of Company Exhibits 2 and 3 are at clear variance with the terms of the Collective Bargaining Agreement and are void and unenforceable. The Grievant was required, in Company Exhibit 3, to sign an undated letter of resignation which the Company could make effective should Johnson violate the other terms of that document. As noted earlier, the consequence of failing an alcohol test is set forth in Part 5(C) and does not include a requirement that an employee sign a letter of resignation. Perhaps, the Company confused the Grievant's situation with the consequences of failing a drug test which does, under the contract, provide for an undated letter of resignation (See Part (B)(iii)).

The Grievant also, in Company Exhibit 3, was required to waive his right to grieve in order to enter into the EAP program and be returned to work. Under the same analysis discussed above concerning the requirement of a letter of resignation, this requirement of Company Exhibit 3 exceeds and is at variance with Part 5(C) of the Collective Bargaining Agreement.

To the extent that Company Exhibit 2 can be read to require that the Grievant consume no alcohol, that provision is at clear variance with Part 5(B) and (D). Those provisions set forth the consequences of such a failed test. Neither provides that the employee cannot after his first failed test consume any alcohol.

In addition to the contentions set forth earlier concerning the Union's position that the requirement of an undated letter of resignation violates the contract, Union contends that it does so for an additional reason. That is, the contract (Part 5(B) and (D)) sets forth the consequences of a second failed alcohol test and does not require that the employee be terminated (or his letter of resignation accepted). Even for a second failed test a level at or greater than .04, the contract provides that the employee will no longer be permitted to work as a mechanic or in a safety sensitive position. Within the Collective Bargaining Agreement, there are non-mechanic positions which are not safety sensitive. Accordingly, cessation of employment is not mandated by the contract.

The contract, in at least two sections, mandates that an employee subjected to an alcohol test may have it done through a blood sample if he requests. In this case, Johnson did request a blood test and it was denied to him. (See Article 14, Exhibit 1, Part 9(C) and Part 3.

In the view of the Union, the foregoing demonstrates that the entire drug testing and the handling of the results of the drug tests was tainted by multiple and serious violations of the Collective Bargaining Agreement. The entire process should be voided for these reasons. In particular, for the reasons set forth above, Company Exhibits 2 and 3 should be deemed in violation of the parties' Collective Bargaining Agreement and voided.

Based upon all of the foregoing, Union contends that the Grievant should be ordered reinstated with full back pay, seniority and benefits.

DISCUSSION AND OPINION

The threshold question in this case arises from the Company's challenge to the arbitrability of the grievance that asserts the Last Chance Agreements (Company Exhibits 1, 2 and 3) are invalid. The Company argues that the grievance against the validity of these agreements should be dismissed on the following grounds:

- The grievance has not been progressed to arbitration.
- The grievance properly before the System Board of Adjustment at this time involves solely the issue of his termination—not over whether the Last Chance Agreements violated the Collective Bargaining Agreement.
- Those Agreements were executed by the Grievant and by the IBT business agent authorized to do so, and upon the advice of legal counsel.

Analysis and Conclusions

Since the time of the Steelworkers' Trilogy, the general rule regarding arbitrability has advised that absent firm evidence to the contrary, more doubts should be resolved in favor of coverage. The Supreme Court spoke even more forcefully in *Warrior and Gulf Navigation* where the issue involved substantive rather than procedural arbitrability. Nonetheless the majority view of arbitrators seeks diligently to resolve issues on the merits in accord with the ancient, adage that "the law abhors a forfeiture."

Turning attention now to the Company's arguments, the first asserts that the arbitrability issue has not been progressed to arbitration and cities the testimony of Director of GSC operations Rodney Cox in support of that position. I do not find his testimony dispositive of the argument that the issue of the validity of the Last Chance Agreements is non-arbitral.

Cox reported on the results of a February 12, 2001 System Board of Adjustment discussion where the Board did not take jurisdiction over the termination grievance. He testified:

> . . . The initial grievance filed here was for wrongful termination. There was no termination case before the Board by virtue of the fact that the settlement agreement was signed by Mr. Johnson. That issue went away. (Tr 11).

Next, Cox responded as follows in direct examination:

Q: You keep a file of all the decisions made by the System Board?

A: I do.

Q: Okay. Are you aware of the discussions – let me refer you to the decision here in the final sentence of the decision. It says, "The decision of the Board is to deadlock the case to arbitration based on the point of order."

Q: Are you aware of discussions between the Company and the Union with respect to submitting Mr. Johnson's grievance to arbitration?

A: I am.

Q: And can you describe for the Board the nature of those discussions and who those discussions were between?

A: The discussions, as best as I can remember, involve Steve Greenwell; yourself; Jeff Wall; myself. It was even elevated as high as Dan Casey at one point.

Q: And who is Dan Casey?

A: He's the staff vice president of labor relations for Continental Airlines.

Q: Okay. And you describe the discussions—

A: Sure.

Q: —in terms of what, for example, what the Union was seeking and what the Company agreed to do?

A: In brief, the Company continued to maintain its position that by signing the settlement agreement, Mr. Johnson waived his right to any grievance under the process. We weren't going to stop Mr. Johnson from filing the grievance. In fact, we heard—we received Mr. Shafer's grievance instead. But we did not want to arbitrate the case, and we felt like the issue was not arbitrable under the agreement, however, we did agree to go ahead and hear the case and send it to arbitration.

Q: Okay. And so the parties agreed to submit the issue of arbitrability to the System Board—or to the—

A: To the arbitrator.

Q: To the arbitrator?

A. Correct.

(Tr 12-14)

In light of this testimony, the conclusion logically follows that the grievance properly here for arbitration must be that numbered CAL-IBT-01-02-020 because no other grievance subsequent to that filed on March 29, 2001 has been entered into this hearing record. That is the grievance number which was identified at the outset of the hearing.

Grievance CAL-IBT-01-020 conspicuously states the Grievant's claim as "Now on March 23-01 I was wrongfully terminated due to a violation of Contractual Right Per Article 14-8." While the record reflects some degree of confusion over whether this present System Board of Adjustment in fact has jurisdiction over the arbitrability of the preclusion effect, if any, of the Last Chance Agreement over the Union's arguments based on certain terms of the Collective Bargaining Agreement.

In keeping with the arbitral principle of resolving reasonable doubts over procedural arbitrability in favor of coverage, I therefore conclude that there is sufficient support

in the record for this System Board of Adjustment to assert jurisdiction over the threshold issue of arbitrability.

At a minimum, the matter of the validity of the Last Chance Agreements remains a testable proposition. In this regard the Union's position that those Agreements represent amendments or modifications of the Collective Bargaining Agreement requiring the signature of the director of the Teamsters Airline Division Ray Benning.

Ruling: Based on the foregoing discussion and analysis, the validity of the Last Chance Agreements, including the Grievant's conditional letter of resignation.

* * *

Issue No. 2: Are the Last Chance Agreements valid and binding?

Analysis: The Company's evidence firmly establishes that these documents are clear and plainly drawn and were fully explained to the Grievant in the presence of his union representative. Before signing these documents, the Grievant and his business agent received the advice and guidance of the Union's legal counsel.

Thus, all of the necessary elements were in place for the Grievant to enter into an informed, voluntary Last Chance Agreement in order to keep his job when faced with compelling proof that he was guilty of committing a dischargeable offense, i.e., reporting for work intoxicated. All that remains of the Union's challenge to the validity and binding nature of these Last Chance Agreements is the contention that they represent amendments or modifications of the collective bargaining agreement. If so, it is undisputed that they would require the signature of Ray Benning to gain legal force and effect.

The basis for the Union's argument in support of the claim that these Agreements rise to the level of amendments or modifications of the collective bargaining contract rests on

the fact that the terms and conditions imposed exceed anything provided in the labor contract pertaining to testing, treatment, and reinstatement of chemically dependent employees. This line of argument lacks merit for several reasons.

In the first instance it must be noted that, by their very nature, last chance agreements impose certain conduct of the employee more stringent than that required of others under the terms of the same collective bargaining contract. If this were not the case, there would be no need for last chance agreements and they would quickly disappear from the labor relations scene.

Indeed, arbitrators regularly see and are called upon to apply last chance agreements which have become common features of modern industrial discipline systems. The Last Chance Agreements at issue in this case differ in no important particulars from several dozen that I have dealt with in the airline industry, none of which amended or modified their respective labor contracts.

In order for a so-called last chance agreement to amend or modify a collective bargaining agreement, its terms must somehow alter or change the negotiated terms and conditions of employment as they affect all other members of a bargaining unit. In no sense can the Last Chance Agreements here for review have such force or effect. Instead these documents leave intact to the virtual black letter each and every provision contained in the parties' Collective Bargaining Agreement.

Some arbitrators have found it illustrative to analogize the legal status of an employee who signs a last chance agreement to one who declines to grieve any disciplinary action in the sense that both merely waive their right to pursue putative contractual options. Such waiver does not detract at all from the right of any similarly situated employee in the future to

decline the offer of a last chance agreement and instead, opt for remedy through the contractual grievance procedure.

In situations where an employee's decision not to grieve may place the contractual rights of other bargaining unit members at risk, common practice permits the Union to file a so-called policy grievance in the interest of protecting the integrity of the Collective Bargaining Agreement. That kind of situation is not present in the instant case.

Ruling: Based on the foregoing discussion and analysis, the Last Chance Agreements at issue are found to be valid and binding.

* * *

Issue No. 3: Did the Grievant violate any term of the Last Chance Agreement?

Analysis: The Union argues that under the circumstances involved the Grievant's admitted use of cough medication containing alcohol did not violate any part of the Agreements he made with Continental and cites the following provision:

> During the one year rehabilitation period/contract, commencing with the date of this agreement, any use of alcohol or illicit drugs will be considered a violation of this agreement. This includes mouthwash or other medication substances which may contain alcohol. If your doctor prescribes medication which contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.

(Paragraph 1 of Company Exhibit 2)

The Union relies in this regard on the uncontroverted testimony that the Grievant's doctor approved his use of an over-the-counter cough medication to tide him over until he could be seen in the doctor's office. When the Grievant discovered that the medication contained alcohol, he at-

tempted to contact his EAP representative Steve Skidmore, as required, who was out of town and did not return his call.

In summary form, Continental argues that notifying EAP that he was taking cough medication does not excuse the Grievant from his obligation to refrain from using any alcohol because he "never informed Continental that he was taking medication that contained alcohol." (Company Brief, p. 9)

The Board finds this line of argument to be so highly technical as to be unpersuasive. Granted that the Grievant's doctor did not "prescribe" the particular medication in the technical sense that it involved a written prescription medication requiring the services of a licensed pharmacist. Neither did his doctor "prescribe" a particular brand or type of cough medication. The fact that the doctor approved the use of a cough medicine, however, surely means that the Grievant did not take it upon himself to somehow circumvent the purpose of the Last Chance requirements by unsupervised self-medication.

More to the point, the Grievant fully met the letter and the spirit of Paragraph 1, as quoted above, both by securing his doctor's approval for cough medication and then by promptly notifying his EAP representative Skidmore "of such medication." It would have been eminently reasonable for Skidmore to have returned the Grievant's call in order to warn him that taking the medication would violate the Agreement and cost him his job, if in fact that were the case.

The Board remains at a loss to understand why Continental's chosen EAP professional did not deem it important to so advise and warn the Grievant. The EAP's testimony in this regard falls far short of a satisfactory explanation in the following excerpt from the hearing transcript:

Q: . . . his doctor maybe didn't write out a prescription, but his doctor suggested to him that you use an over-the-counter cough medication, and under the terms of

Company Exhibit 2, he immediately called you to tell you that?

A: That's correct.

Q: Did he do anything wrong?

A: No.

Q: Did he do anything wrong by then using the cough medicine?

A: No.

Q: One thing that's troubled me throughout all of this is knowing that Mr. Johnson is in the program, that he is an alcoholic, that he's calling you to tell you that, "My doctor is having me use an over-the-counter cough medicine," why didn't you call him back and talk to him about the implications of that?

A: Because he didn't say "his doctor." He said he was taking an over-the-counter medication.

Q: Why—still, why wouldn't you call him back and, if nothing else, tell him, "Don't do that. You're in violation of your agreement. Why are taking this," at least found out how you came to this point?

A: He is not in violation of his agreement to take cough medicine.

Q: With alcohol in it?

A: He did not say it had alcohol in it.

Q: Why would he call you if it didn't have alcohol in it? He doesn't call you to tell you when he's eating Chinese food?

A: That's correct.

Q: With one of your program folks calling you in apparent compliance with this Agreement, saying "I'm taking cough medicine. Please call me," or whatever he said to you, why didn't you call him back?

A: He called me to inform me that he was taking an over-the-counter cough medicine.

Q: And you knew that there were potential implications of that, and you still haven't answered my question. Why didn't you call him back?

A: I didn't deem it was necessary because it was an over-the-counter medication.

The Board finds EAP representative's explanation particularly problematic in light of his earlier testimony regarding the potency of over-the-counter cough medication:

Q: All right. What percentage of alcohol does over-the-counter cough syrup typically have? Do you know?

A: It varies. It can run anywhere from 25 to 50 percent. It varies from manufacturer to manufacturer.

Q: So if someone had cough syrup that was 50 percent alcohol, that's 100 proof; That's whiskey?

A: One could make an argument for that.

Q: Well, I mean, whiskey is 80 or 86 proof, so we're talking about if it's 50 percent alcohol, you're talking about something that's got alcohol of a mixed drink, whiskey, gin, bourbon, anything of that sort? Are you seriously telling me that if someone ingested over the period of time that Mr. Wall suggested to you, was taking an ounce or more of what over a period of time that he wouldn't test positive for alcohol?

A: I'm saying it's been my experience that that usually does not happen.

(Tr 45, 46)

It simply makes no sense that the Company's EAP professional should receive a call from the Grievant saying he was taking cough medicine, which Skidmore believed could contain 50-100 proof alcohol by volume, [1] and not return the

[1] It makes no difference to the Board's analysis that Skidmore's estimate of the alcohol content of over-the-counter cough/cold syrups is unduly high. What matters is that despite thinking it to be this high, he

call to tell him "Don't do that. It will put your job on the line."

A fundamental principle of arbitral due process requires clear and timely notice of the consequences for violation of a rule of conduct. It should be obvious that the written version of the Last Chance requirements fail to provide clear notice when Skidmore can say he didn't return the call because the Grievant didn't specify that the cough medicine contained alcohol. This is [a] meaningless quibble in view of the language requiring notification to EAP staff of "medication substances which *may* contain alcohol." (Emphasis added).

In like vein, the non-issue of whether the Grievant's doctor prescribed or recommended rather than approved his use of an over-the-counter cough medication further reveals the inherent ambiguity of terms of art which could have been and should have been resolved by a timely return call from Skidmore or his EAP designee in his absent. [sic]

Finally, Continental cites as just cause for termination the following provision:

> During the remainder of his career with Continental, should Johnson subsequently fail any drug or alcohol (.04 or greater) test, the undated letter of resignation will be accepted by the Company and his employment severed.

The evidence shows that the confirmatory test, the determinative result, taken in March, 2001 under the supervision of Gabrielle McAmis was well below .04. Concentra Center administrator McAmis testified that following "screening," i.e., the merely preliminary test, the confirmatory test was given with a reading of .029.

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nonetheless did not bother to provide the Grievant the timely notice which might well have saved his job.

On the face of the above-cited provision, the .029 confirmatory alcohol test obviously did not qualify for summary acceptance of the Grievant's undated letter of resignation.

This review ought not close without observing that while the Company's evidence and procedural defects may have fallen short of proving that the Grievant violated the Last Chance/Rehabilitation Agreements, his ignorance of his sobriety date and of the essential first steps of AA's recovery program shows a pathetic lack of knowledge of and commitment to what it takes to live a life of sobriety. Unless and until the Grievant makes the commitment to learn and to sincerely work the twelve steps of the AA program the strong probability is that he will eventually lose his job to the dread disease of alcoholism.

DECISION

- Based on the foregoing findings and conclusions, the grievance is hereby sustained.
- As remedy the Company shall reinstate the Grievant to his former position and make him whole for all loss of wages and benefits attributable to his discharge.
- The board retains jurisdiction in this case for a period of ninety (90) calendar days from the date of effective issuance of this Award.

2/7/03 Date	John J. Flagler, System Board Chair
_____ Date	Dan O'Connor, Company Board Member (Concur/Dissent)
2/12/03 Date	James Hicks, Jr., Union Board Member (Concur/Dissent)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

In the Matter of Mark Johnson,

MARK JOHNSON,

and

CONTINENTAL AIRLINES, INC.

AGREEMENT

This Agreement is made and entered into in accordance with the provisions of Title II of the Railway Labor Act, as amended, by and among Continental Airlines, Inc. (CAL), the International Brotherhood of Teamsters (IBT), and Mark Johnson (Johnson).

Pursuant to Article 14, Exhibit 1 of the January 1999 collective bargaining agreement between CAL and IBT, the parties have agreed to the following terms:

1. Effective on the date of this Agreement, Johnson's discharge, as a result of his August 18, 2000 alcohol test result indicating an alcohol concentration of .115, will be converted to a disciplinary suspension for gross misconduct and violation of CAL's Drug and Alcohol Misuse Prevention Policy. Johnson will be reinstated to his previous position as a technician, effective upon the date of this Agreement, subject to all the following conditions set forth in this Agreement.

2. As a condition of continuing employment, Johnson agrees to undergo evaluation by CAL's Employee Assistance Program ("EAP") Director (or designee) and to complete any rehabilitation recommended by EAP. Johnson may return to work only after satisfying the applicable requirements and conditions of this Agreement. CAL shall not be liable for any

backpay or benefits for the period of Johnson's disciplinary suspension or for the period of his absence from work for evaluation and rehabilitation, as specified in this Agreement.

3. Effective on the date of Johnson's return to work, he will be placed on a termination warning level of discipline, which shall remain in effect for a period of 18 months.

4. Johnson's continuing employment shall be conditional upon his compliance with all of the following conditions:

i. Johnson must submit to initial evaluation by Continental's EAP Director or the Director's designee.

ii. If one is recommended, Johnson must successfully complete the course of rehabilitation recommended by Continental's EAP, including all continuing terms and conditions attached to such course of rehabilitation. The rehabilitation will be directed and facilitated by Continental's EAP, but will be funded entirely by Johnson, except that he shall not be precluded from using any insurance benefits to which he is otherwise entitled.

iii. Johnson must execute and deliver to the EAP Director an undated letter of resignation to be used to terminate his employment should he fail to satisfy any of the terms of this Agreement or of the rehabilitation directed by EAP.

iv. During the remainder of his career with Continental, should Johnson subsequently fail any drug or alcohol (.04 or greater) test, the undated letter of resignation will be accepted by the Company, and his employment severed.

v. Johnson shall agree in writing to be subject to "no notice" alcohol testing at the direction of the Company as frequently as the Company may decide for a period of five (5) years from the completion of the

formal rehabilitation program. (Following the five (5) year period during which he shall be subject to no notice testing, Johnson shall be obligated only to submit to such further testing as may be required by applicable federal regulations or this Agreement.)

vi. If Johnson fails to comply with the provisions of the conditions of his continuing employment, termination will result, and his right to challenge such termination through the grievance process shall be waived. No grievance of the matter shall be permitted.

5. Except as mutually agreed by the parties, Johnson shall meet the with Continental's EAP Director or the Director's designee within 14 days from the date of this Agreement for an initial evaluation.

6. Upon release by EAP to return to work, Johnson shall complete a return-to-work drug test. A positive result for any drug test shall be cause for Johnson's immediate termination.

7. Johnson acknowledges that he will have no right to file a grievance concerning the Company's acceptance and execution of his letter of resignation and/or termination of employment.

8. Johnson and the IBT agree to withdraw the grievance contesting Johnson's termination.

9. In consideration of the foregoing, Johnson hereby releases the International Brotherhood of Teamsters, its officers, employees and agents, CAL, and any related company or entity including Continental Express, Inc. and Continental Micronesia, Inc., their officers, employees, and agents from any and all claims, rights, demands, actions, causes of action, suits, charges, losses, and damages of any nature whatsoever, in law or in equity, including those pursuant to any contractual grievance procedure, which he

has or has had or may hereafter claim to have had arising from or by reason of any matter, act, omission, cause, or thing whatever, whether known or unknown, which has occurred at any time in the past and up to the date of full execution hereof. This release specifically includes, without limiting the foregoing general terms, any and all claims arising from or in connection with Johnson's employment with or termination from CAL.

10. The parties recognize that this Agreement is entered into for the purpose of resolving a disputed claim, and that CAL's agreement hereto will not be construed as an admission that CAL violated any agreement between the parties in any respect, or that it violated the law. This Agreement shall be confidential, non-precedential and non-referable. CAL and the Teamsters specifically agree that neither the underlying facts nor the fact of the Agreement shall be introduced into evidence in any arbitration hearings involving the Teamsters, CAL, Continental Express, Inc., or Continental Micronesia, Inc., except the underlying facts and the fact of the Agreement may be introduced in any System Board or arbitration hearing concerning any subsequent discipline or termination of Johnson.

11. Johnson represents that (a) he is over 18 years of age and thoroughly understands that this Agreement is a complete, full and final settlement of any and all disputes with Continental; (b) that he is entering into this Agreement freely and voluntarily and after seeking advice of counsel; (c) that he understands that the consideration herein is all that he will receive or be entitled to receive as a result of his claims and that he will have no right to file suit against Continental Airlines, Inc., its officers, employees, agents, and any related company or entity; and (d) that he has been fully and fairly represented by the IBT.

Each party hereto represents that she/he has the authority to enter into this Agreement, and does so freely and without duress.

AGREED and ACCEPTED

FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS	FOR CONTINENTAL AIRLINES, INC.
DATE: 9/5/00	DATE: 9/5/00
MARK JOHNSON	
DATE: 9-5-00	

Continental Airlines
EMPLOYEE ASSISTANCE PROGRAM
Mandated Referral
Alcohol/Drug Rehabilitation Agreement

Mark Johnson, Employee #59677

Pursuant to Continental's Alcohol and Drug Policy you were required to undergo assessment by Continental's Employee Assistance Program (EAP). As a result of your actions which led to this Mandated Referral, your continued employment at Continental is contingent upon your satisfactorily meeting the Company's performance/attendance standards and your agreement and completion of the following terms and conditions:

1. During the 1-year rehabilitation period/contract, commencing with the date of this Agreement, any use of alcohol or illicit drugs will be considered a violation of this Agreement. This includes mouthwash or other medications/substances which may contain alcohol. If your doctor prescribes medication which contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.
2. You are subject to no-notice testing during the rehabilitation period for not less than 1 year or more than 5 years. The no-notice test screens for 10 drugs, plus alcohol. Failure to report for a test will result in termination.
3. You are required to participate in the following activities, starting immediately:
    a. Intensive Outpatient treatment for Chemical Dependency. Name of Treatment Program: The Right Step Length of Treatment: determined by the treatment provider in consultation with the EAP.

b. Attendance in Aftercare. Length of Aftercare: a minimum of one year.

c. Attendance in the 12-step program of AA, for an average of three times weekly for one year (to be reviewed). Confirmation of your attendance must be provided to: the EAP Manager upon request.

4. **You are responsible for maintaining contact with the EAP Manager on at least a monthly basis for the purpose of monitoring your progress.** The minimum length of this contract is 1 year. However, depending upon your progress & cooperation, it can be extended an additional 4 years. Failure to maintain monthly contact with your EAP manager will result in termination of this Agreement. Understand that information regarding compliance with this Agreement will be communicated between the EAP Manager and the supervisor.

5. Other: participate in the Continental Airlines Aftercare Program for a minimum of one year.

I agree to the terms as outlined above. I understand and agree that if I violate the terms of this agreement, my employment with Continental Airlines will be terminated without recourse to the grievance process.

_____	_____
Employee	Supervisor
_____	_____
HR Manager	Date

IBT/Continental Airlines
Collective Bargaining Agreement

Article 19—Grievance Procedure

A. In the event of a grievance arising over the interpretation or application of this Agreement or in the event of disciplinary action, not involving loss of pay, the following procedure shall be followed:

1. The aggrieved employee will first present the complaint to his supervisor for discussion and possible solution. During this discussion, the employee may be represented by his shop steward or Local Business Representative. It is understood and agreed that decisions made at the first step of the grievance procedure by the supervisor, employee and/or his representative shall not constitute a precedent of any kind unless otherwise agreed to by the Union and the Company.

2. If the complaint cannot be resolved through a discussion, the grievance shall be reduced to writing by the employee or his representative, signed by the employee or his representative, and presented to his supervisor within ten (10) calendar days after the employee or his representative reasonably would have knowledge of the incident upon which the grievance is based.

3. The grievance will be answered in writing by the supervisor, who will send a copy to the grievant, the shop steward and the Union Representative, within ten (10) calendar days after he receives the written grievance.

4. If the decision of the supervisor is not satisfactory, the employee or his Union Representative may appeal the grievance to the Company designee, provided such appeal is presented in writing within ten (10) calendar

days after the written decision of the supervisor has been presented to the grievant, the shop steward, and the Union Representative.

5. The Company designee will answer the grievance(s) in writing to the Local Business Representative within ten (10) calendar days following the receipt of the written appeal.

6. Within fourteen (14) days after the receipt of the written decision of the Company designee, if the decision is not satisfactory to the employee and his Union Representative, the Union may appeal such grievance to the System Board of Adjustment by serving a written notice upon the Company directed to the Vice President of Maintenance or his designee at the Company's office of its intention to do so. If the System Board deadlocks, the case may be appealed to arbitration by the Union.

B. *Discharge and Disciplinary Procedure*:

1. In the event an employee is suspended pending investigation and is subsequently found innocent of the charges, he will be paid for such lost time from work.

2. In those instances where the Company discharges or disciplines a nonprobationary employee to the extent of loss of pay, such disciplinary action will not be imposed until a fact/finding meeting is held between the employee's supervisor, the employee, and his steward. Nothing shall preclude the Company's right to suspend any employee without loss of pay pending such meeting. The purpose of such meeting is to interview pertinent witnesses, establish pertinent facts and determine any possible solution, it being understood and agreed that decisions at such level shall not constitute a precedent. The Company represen-

tative involved will, within ten (10) calendar days after such meeting, render a decision in writing to the employee, unless further investigation is required, in which case the Company will notify the affected employee and the Union of the reasons for the delay.

3. Employees of the Company who are on duty and are called as witnesses will suffer no loss of pay. The number of witnesses summoned at any one time shall not be greater than the number that can be spared from the operation without interference with the services of the Company.

4. If the decision of the Company's representative is not acceptable to the Union, the decision may be appealed by the Union to the System Board of Adjustment within fourteen (14) days after receipt, by serving written notice to the Vice President of Maintenance at the Company's Administrative Office of its intention to do so.

5. The System Board of Adjustment shall be composed of two members designated by the Company and two members designated by the Union. The Board shall meet at Houston, unless another city is mutually agreed to. The Board shall meet as needed. In the case of a discharge, the Board of Adjustment shall convene within thirty (30) days of the date the discharge is appealed to the System Board of Adjustment. In the case of a discharge, the Board of Adjustment shall convene at the station where the discharged employee worked unless another city is mutually agreed to.

6. The System Board shall only be empowered to make a finding or decision with respect to any non-probationary employee covered by this Agreement who is terminated or disciplined to the extent of loss

of pay by the Company, and such finding or decision shall be final and binding upon the Teamsters—Airline Division, the Company and the individual employee or employees to such dispute.

7. If the Board deadlocks, the Union may appeal the case to arbitration.

8. In the event the Union appeals the disciplinary action to arbitration the Company and the Union shall attempt to agree on a mutually acceptable impartial arbitrator. If the parties are unable to agree on an arbitrator they shall select an arbitrator as provided in Article 20, Board of Arbitration.

C. All time limits will be complied with by the Company, the employee(s), and the Union. If the Company does not comply with the time limits, the grievance will be deemed automatically appealed to the next step.

D. The Company recognizes the right of the Union to file a group grievance when the issue is common and identical to those employees in the group.

E. In the event of permanent change of the parties responsible for answering grievances at any step of this grievance procedure, the Company will notify the Union as soon as possible.

F. The time limits set forth in this Article may be extended by mutual agreement of the parties reduced to writing.

G. The Union, or its representative, and the Grievant shall have access to the Grievant's personnel file for review in any discipline or discharge case. The Union shall be entitled to copies of any documents from the file that it may determine are needed.

ARTICLE 20 – BOARD OF ARBITRATION

A. After the receipt of the notice of the intent to submit the unsettled grievance to arbitration, the parties shall attempt to mutually select an impartial arbitrator. If the parties are unable to agree on an arbitrator, they shall request the National Mediation Board to submit a list of seven (7) persons qualified to act as the impartial arbitrator. Each party may reject the NMB list once. A representative of the Company and a representative of the Union shall meet within five (5) days of the receipt of the list and shall alternately strike three (3) names from the list, the party to strike first to be selected by lot. The seventh (7th) remaining person shall thereupon be selected as the impartial arbitrator. The Board of Arbitration shall consist of one (1) member selected by the Union and one (1) selected by the Company, and the impartial Arbitrator.

B. The parties shall enter into a submission agreement, which shall clearly state the arbitrable issue or issues to be decided. If the parties are unable to agree on a joint statement of the arbitrable issue or issues to be decided by the arbitrator, the submission shall contain the written grievance and the Company's disposition of the same with notation that the parties could not agree upon a submission agreement. Either party may also submit its proposed version of the arbitrable issue or issues to be decided by the arbitrator.

C. During the hearing, each Party shall have full opportunity to present evidence and argument, both oral and documentary. The impartial arbitrator may render his findings and award in writing no later than sixty (60) calendar days after the conclusion of the hearing. The decision of the impartial arbitrator shall be final and binding. The impartial arbitrator shall have no authority to modify, amend, revise, add to or subtract from any of the terms or conditions of the Agreement.

D. All arbitration hearings will be held in Houston unless another place is mutually agreed to by the Company and the Union.

1. Each of the parties hereto shall assume the compensation, traveling expenses and other expenses of its witnesses called or summoned by it and each of the parties shall assume one-half (1/2) of the expenses of the arbitration, except that the employees of the Company who are necessarily summoned to serve as witnesses and the grievant, if not discharged or on suspension, should suffer no loss of pay as a result of participation in the arbitration proceeding.

2. Witnesses who are employees of the Company and the grievant shall receive free transportation over the lines of the Company from their point of duty or assignment to the point at which they must appear as witness before the Board and return, to the extent permitted by law.

3. It is understood and agreed that each and every witness summoned by the Board who is an employee of the Company shall be free to discharge his duties in an independent manner without fear that his individual relations with the Company or the Union may be affected by an action or by testimony given by him in good faith in his capacity as a witness.

4. If a stenographic transcript is made of the arbitration proceeding the party making the request shall bear its expense, unless the request is made by the arbitrator, in which case the cost of the transcript will be shared equally by the Company and the Union. In the event the party not requesting the transcript decides at the hearing or later to obtain a copy, the Company and the Union shall share the entire cost of the reporting and transcribing of the transcript equally.

E. Employees who are summoned to serve as witnesses, if called during their regularly scheduled work hours shall suffer no loss in pay for such regularly scheduled work hours. Any employee who is summoned to serve as a witness during the day hours and works graveyard or swing shift and is retained beyond 12 noon will not be required to work his shift the day of the hearing; however. such employee shall be paid for his regularly scheduled shift for that day by the Company.

Supreme Court, U.S.
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No. 04-1249

IN THE

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit properly applied *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) to the unique facts of this case?

CORPORATE DISCLOSURE STATEMENT

Respondent, Continental Airlines, Inc., has *no parent* corporation and no publicly held corporation owns 10% or more of Respondent's stock.

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I

STATEMENT OF THE CASE

A. *Course of Grievance Proceeding, Settlement, Arbitration, and Disposition in the Courts Below*

Continental Airlines, Inc. ("Continental") first terminated the employment of commercial aircraft mechanic Mark Johnson ("Johnson") for reporting to work with a breath alcohol level of 0.115. Johnson's intoxication level was nearly six times the level at which federal regulations mandated his immediate removal from the workplace[1] and was discovered only through the happenstance of a Department of Transportation ("DOT") mandated random drug and alcohol test.

The International Brotherhood of Teamsters ("IBT") grieved Johnson's discharge from his safety-sensitive position under the grievance procedures of the collective bargaining agreement ("CBA") between Continental and the IBT local union. Rather than pursue Johnson's discharge to arbitration under the CBA, IBT settled the grievance by entering into a last chance agreement ("LCA") that, among other things, provided for Johnson's conditional reinstatement subject to strict conditions concerning use of alcohol. These conditions included an assessment for alcohol dependency and Johnson's satisfactory completion of a course of rehabilitation, if determined necessary by Continental's Employee Assistance Program ("EAP") director.[2] After an individualized assessment, Continental's

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[1] 14 C.F.R. pt. 121, apps. I and J (2005).

[2] Continental's EAP director was the company's Substance Abuse Professional ("SAP") as required by federal regulations (Cont'd)

EAP director prepared a course of rehabilitation for Johnson for alcohol dependency, to which Johnson committed as a condition of continued employment (the "EAP Agreement"). Among other things, the EAP Agreement prohibited Johnson's use of any alcohol, including over-the-counter medications and substances, for one year. During the pendency of the EAP Agreement, and pursuant to the LCA, Johnson was conditionally reinstated to his safety-sensitive aircraft mechanic position. As a condition of the Agreements (the LCA and EAP Agreement are collectively referred to herein as "Agreements"),[3] Johnson delivered a prospective, undated letter of resignation to Continental's management to be used to terminate Johnson's employment should Johnson fail to comply with any provision of the Agreements. Discharge under the Agreements was not subject to the grievance provisions of the CBA. (Pet'r App. 60a, 64a.)

Just three months after signing the EAP Agreement, Johnson failed an on-duty, no-notice alcohol breath test required by the EAP Agreement. Continental accepted Johnson's letter of resignation terminating his conditional reinstatement to employment. Johnson made the tired excuse that it must have been the unverifiable "cough syrup."IBT

(Cont'd)
governing transportation employee rehabilitation programs. Federal law vests authority for drug and alcohol assessment, referral and monitoring of covered employees with this Substance Abuse Professional. *See* 49 C.F.R. § 40 (2004); 14 C.F.R. pt. 121, app. J, Section VI (C) (2005).

[3] Petitioner challenged the validity of the Agreements before the System Board of Adjustment, but as noted by Petitioner, the Board found both the LCA and EAP Agreement binding. (Pet. at 6.) The Fifth Circuit treated these as part of the same agreement for purposes of its decision. (Pet'r App. 7a, at n.4.)

appealed Johnson's second termination to the System Board of Adjustment (the "System Board")[4] as a minor dispute under the Railway Labor Act ("RLA").[5] The System Board found that Johnson consumed non-prescription alcohol and exhibited a "pathetic lack of knowledge of and commitment to what it takes to live a life of sobriety." (Pet'r App. 53a, 57a.) Despite these findings, the System Board concluded that Johnson did not violate the Agreements and awarded reinstatement with back pay (the "Award").

Continental filed an action for review and vacation of the Award in the district court alleging, in part, that (1) the System Board exceeded its authority when it ignored the express terms of the Agreements, (2) the System Board exceeded its authority and competency in substituting its judgment in place of Continental's SAP, and (3) reinstatement of an airline mechanic with a demonstrated propensity to work under the influence of alcohol violates public policy. Both parties moved for summary judgment. The district court granted the IBT's motion for summary judgment and ordered enforcement of the Award. (Pet'r App. 29a.)

Continental then moved to stay enforcement of the Award pending appeal. The district court found that "Continental

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[4] The three-member System Board was composed of two partisan members, a carrier representative (Dan O'Connor) and a union representative (James Hicks, Jr.), as well as a neutral arbitrator and chairman (John Flagler). (Pet'r App. 57a.) As a practical matter, the neutral arbitrator makes the decision and writes the Award.

[5] Continental arbitrated the question whether Johnson breached the Agreements before the System Board as a minor dispute under the RLA, but not through the CBA's grievance process as the Agreements, in the context of a "last chance" following settlement of a prior discharge grievance, rejected the CBA's grievance procedures. (Pet'r App. 23a.)

has presented a substantial case on the merits." (Resp't App. 3a.)[6] The district court noted that Continental also made a "forceful" public policy argument, "namely the risk involved in returning Johnson to his safety-sensitive aircraft mechanic's job notwithstanding the System Board's determination that Johnson showed a pathetic lack of knowledge and a lack of commitment to lead a life of sobriety." (Resp't App. 4a.) The court recognized that "Johnson has a demonstrated propensity to abuse alcohol and has reported to work as an airline mechanic while intoxicated" and that his return to work "would pose an unwarranted risk to the public and, under worse case assumptions, may result in disaster." (Resp't App. 5a.) Consequently, the district court stayed its own order enforcing the award. (Resp't App. 6a.)

Petitioner filed a motion to vacate the district court's stay in the Fifth Circuit. The Fifth Circuit refused to vacate the stay. (Resp't App. 1a.)

On November 15, 2004, the Fifth Circuit panel, in a unanimous opinion, reversed the district court and vacated the Award.[7] The Fifth Circuit refused to allow the System

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[6] Respondent's appendix will be cited "Resp't App. __."

[7] In arbitration proceedings before the Board of Adjustment, the arbitrator "shall have no authority to modify, amend, revise, add to or subtract from any of the terms or conditions of the Agreement." (Pet'r App. 69a.) Because the Fifth Circuit found that the System Board exceeded its authority when it ignored the express language of the Agreements, it did not reach Continental's other points of error: *i.e.*, (i) whether the System Board exceeded its authority and competency by substituting its judgment for that of Continental's (Cont'd)

Board to ignore the express terms of the Agreements. (*See* Pet'r App. 9a-12a.) On December 14, 2004, the Fifth Circuit denied Petitioner's petitions for rehearing and rehearing en banc. (Pet'r App. 13a-14a.)

B. *Petitioner's Misstatements*

Mindful of its obligations under Supreme Court Rule 15.2, Respondent notes for the Court Petitioner's misstatements in order to present a more complete Statement of the Case.

Petitioner misconstrues the facts in the record before the court of appeals by inaccurately representing that the panel "acknowledged that the record before it was silent on the question of whether or not the doctor instructed Johnson directly or indirectly through his medical staff." (Pet. at 14.) As a threshold point, the Fifth Circuit had before it a record establishing that "Johnson's doctor did not prescribe him medicine containing alcohol,"[8] not a record that is silent on this point.[9]

True, the court of appeals correctly notes the complete lack of evidence in *support* of a conclusion that either

(Cont'd)

EAP director/SAP, or (ii) whether the Award should be vacated because Johnson's reinstatement to a safety-sensitive job, notwithstanding his demonstrated propensity to work while intoxicated and the System Board's finding that he has "a pathetic lack of knowledge of and commitment to what it takes to live a life of sobriety," violates public policy. (*See* Pet'r App. 9a, 12a, 57a.)

[8] *See* Pet'r App. 12a.

[9] *See also infra,* part II-B, Reasons for Denying Petition.

Johnson or the doctor's office staff obtained the doctor's approval that Johnson use cough medicine with alcohol, or any cough medicine at all, for that matter. (Pet'r App. 11a.) But the record is not silent about the conduct of either Johnson or the doctor's office staff in this regard.

Johnson, in clear testimony elicited by Petitioner's lawyer on direct examination, testified that he spoke with his doctor's office staff, not his doctor, and that the staff told him they "could not give [Johnson] a prescription drug with not [*sic*] seeing the doctor." (Resp't App. 8a.) Johnson later reiterated that the staff refused to "prescribe medicine without [his] seeing the doctor." (Resp't App. 8a.) Thus, Johnson himself established that he did not speak with his doctor, only the office staff, and that his discussions with the office staff clearly established that the doctor would not prescribe medicine for Johnson without first examining him.

Nor does the System Board's written opinion make factual findings that Johnson's doctor, directly or indirectly, prescribed, considered or allowed Johnson to use cough syrup containing alcohol. On the contrary, the System Board found that "the Grievant's doctor did not 'prescribe' the particular medication in the technical sense that it involved a written prescription medication requiring the services of a licensed pharmacist. Neither did his doctor 'prescribe' a particular brand or type of cough medicine." (Pet'r App. 53a.) Thus, the System Board findings and the Fifth Circuit's view of the record are in accord: Johnson's doctor did not prescribe or approve use of cough syrup containing alcohol. (*See* Pet'r App. 11a-12a.)

As discussed *infra*, the Fifth Circuit vacated the Award because it is uncontroverted—as the System Board agreed—

that Johnson consumed alcohol that was not prescribed by a doctor. Johnson thus violated the express language of the EAP Agreement and the LCA. The System Board, by reading the requirements of "doctor" and "prescribe" out of the EAP Agreement, interpreted the Agreements in a manner that "is not an arguable construction." (Pet'r App. 11a-12a.)

REASONS FOR DENYING PETITION

I. This Case Does Not Merit Certiorari Because It Is A Fact Specific Application Of Well-Settled Law.

As articulated in Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Such petitions are granted "only for compelling reasons." SUP. CT. R. 10.

An issue must be "beyond the academic or episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). This Court reviews issues of importance "to the public, as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. W. Well Works,* 261 U.S. 387, 393 (1923); *Rice,* 349 U.S. at 79.

This Court does "not grant [] certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (noting that certiorari petitions presenting primarily fact questions do not merit Court review).

As Petitioner notes, the EAP Agreement's sole exception to Johnson's immediate discharge for use of alcohol during a one-year commitment period would be that Johnson's

doctor prescribed medicine containing alcohol. (Pet. at 5.) Here, Petitioner asks this Court to review the narrowest of questions, *i.e.*, whether the Fifth Circuit correctly determined that the System Board ignored the express terms of the Agreements in violation of *Misco* when applying this provision. Thus, to ascertain whether the Fifth Circuit's application of the law has been faithful to *Misco*, this Court would have to examine the factual record, the Agreements and the Award to determine whether the Fifth Circuit correctly determined that the Board of Adjustment ignored the plain terms of the Agreements, as it held.

This case does not concern a conflict with other courts of appeal on an "important matter." SUP. CT. R. 10(a). Moreover, the Agreements the Court must review were drafted to settle Johnson's earlier discharge grievance and to address Johnson's alcohol-dependent condition following an individualized assessment of his needs. These are circumstances so idiosyncratic as to apply to Johnson alone. It is, at best, extremely unlikely that any subsequent court will be called upon to consider an arbitral award involving a materially identical contract in the context of materially identical factual circumstances. Thus, any decision on the merits would offer extremely limited utility. Accordingly, review should be denied because this issue is important only to the parties involved, not the public. *See Layne & Bowler Corp.*, 261 U.S. at 393; *Rice,* 349 U.S. at 79.

The Court exercises its discretion to grant certiorari only when a court of appeals has conflicted with other courts of appeal on an "important matter" or "has so far departed from the accepted and usual course of judicial proceeding" that the Court is compelled to exercise its supervisory powers. SUP. CT. R. 10(a). "A petition for certiorari is rarely granted

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Petitioner concedes that the Fifth Circuit stated the correct legal standard and urges review only because, Petitioner contends, the standard was not applied correctly to the facts of this case. No issue worthy of certiorari is presented.

A. *The Fifth Circuit correctly applied Misco's principles in this case.*

1. *Misco* does not permit an arbitrator to disregard unambiguous contract terms.

In attempting to obtain review by the Court, Petitioner relies almost exclusively on the contention that the Fifth Circuit's decision conflicts with the Supreme Court's holdings in the *Steelworkers Trilogy*[10] and its progeny. (Pet. at 8.) This argument wholly lacks merit because the Fifth Circuit's decision is in conformance with the Court's jurisprudence.

Although arbitrators have wide latitude to enforce collective bargaining agreements, this latitude is not absolute. In *United Paperworkers International Union v. Misco, Inc.*, this Court stated: "The arbitrator may not ignore the plain language of the contract." 484 U.S. 29, 38 (1987). The Court reiterated this principle in *Eastern Associated Coal*: "[A]n arbitrator's award 'must draw its essence from the

[10] The Steelworkers Trilogy consists of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

contract and cannot simply reflect the arbitrator's own notions of industrial justice.'" *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (quoting *Misco*, 484 U.S. at 38). The Fifth Circuit was faithful to the following long-standing principles in vacating the Award:

> Courts do not uphold an arbitrator's decision when it dispenses its own "'brand of industrial justice'" outside the scope of an arbitration agreement. *Misco*, 484 U.S. at 36. Rather, courts may review an arbitrator's award "to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the [agreement]." *Delta Queen Steamboat Co. v. Dist. No. 2 Marine Eng'rs Beneficial Ass'n, AFL-CIO*, 889 F.2d 599, 602 (5th Cir. 1989). And, "[w]here an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy." *Id. See also Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995) (holding that if the language of the applicable agreement is "clear and unequivocal, an arbitrator is not free to change its meaning"). In short, an "arbitrator may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38.

Petitioner objects only to the application of *Misco's* principles to the facts of this case. However, the Fifth Circuit considered the Award within the framework set out by this Court in *Misco*. It determined that the System Board ignored the plain terms of the EAP Agreement requiring Johnson's immediate discharge from his safety-sensitive job if he used any alcohol or alcohol-containing substance during a one year rehabilitation period. The sole exception was in the event Johnson used a doctor-prescribed medication containing alcohol, and the System Board's own fact-findings made clear that a doctor did not so prescribe. Certiorari is not appropriate.

2. The Court's *Garvey* opinion is inapposite.

Because no split between the circuits is implicated on any "important matter," Petitioner seeks to establish that the decision below so far departs from the accepted and usual practice of a judicial proceeding, that this Court's intervention through exercise of its supervisory powers is compelled. To satisfy the high threshold at which the Court's supervisory oversight is warranted, Petitioner argues the decision below mimics the errors presented and addressed in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001) (per curiam). (Pet. at 8, 12-13.) *Garvey*, however, is a far different case.

In *Garvey*, the court of appeals overturned an arbitral award for reasons completely different from the Fifth Circuit's reasoning below. Moreover, *Garvey* concerned the award of collusion damages to a professional baseball player under a claim framework applying potentially to a large pool of players. *Garvey's* holdings, therefore, necessarily reached well-beyond the parties in that case.

In *Garvey*, former professional baseball player Steve Garvey submitted a claim against a fund created by team owners in settlement with the players' union for the owners' unlawful collusion.[11] To recover damages, Garvey had to show that his former team offered a contract extension that

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[11] Between 1985 and 1987, Major League Baseball teams colluded to suppress player salaries in violation of the industry's collective bargaining agreement. *Garvey*, 532 U.S. at 505. The players' union filed several grievances against the teams, and arbitrators subsequently found the teams liable for collusion. *Id.* at 505-06. A framework, applicable to all players, was set up for players to make claims against the fund, which Garvey did.

was subsequently withdrawn because of collusion. *Garvey,* 532 U.S. at 506. The union rejected Garvey's claim because he failed to produce evidence that his former team, the San Diego Padres, had offered a contract extension. *Id.* Garvey moved for arbitral review. *Id.*

In making a factual finding about Garvey's claim of a proffered contract extension, the arbitrator considered two pieces of directly conflicting evidence, both emanating from Padres' CEO Ballard Smith: (a) Smith's testimony from the late 1980's collusion hearings where Smith denied collusion and stated that the Padres were simply not interested in extending Garvey's contract, and (b) Smith's 1996 letter stating he initially offered Garvey a contract extension but subsequently refused to negotiate an extension because of collusion. *Garvey,* 532 U.S. at 506-07. The arbitrator doubted the credibility of Smith's 1996 letter in light of his prior testimony adamantly denying collusion. *Id.* at 507. Because the arbitrator credited Smith's testimony in the prior collusion hearings, he concluded Garvey failed to prove a specific offer of an extension and entered an award for the union. *Id.*

Garvey moved to vacate the award. *Garvey,* 532 U.S. at 507. The district court denied relief. *Id.* On appeal, the Ninth Circuit reviewed the arbitrator's finding that Smith's 1996 letter lacked credibility in the face of Smith's earlier testimony. *Id.* at 508. The Ninth Circuit, disagreeing with the arbitrator's credibility assessment, determined that the record below provided "strong support" for the letter's truthfulness and held, directly contrary to the arbitrator's credibility finding, that Smith's prior testimony was not credible. *See id.* at 508. The divided panel ultimately vacated the award, directing the district court to remand the case to the arbitrator with instructions to enter an award for Garvey in the amount he claimed. *See id.*

The Court granted review and reversed because the Ninth Circuit's holding conflicted with the Court's cases mandating limited review of labor arbitration awards.[12] *Garvey,* 532 U.S. at 505. The Court found that the Ninth Circuit "overturned the arbitrator's decision because it disagreed with the arbitrator's decision, particularly those with respect to credibility." *Id.* at 510. The Ninth Circuit's disagreement with such factual findings, even if serious error, did not justify overturning an arbitral award if the arbitrator is "construing a contract and acting within the scope of his authority." *Id.*

Garvey is far different from the instant case. Unlike the Ninth Circuit in *Garvey*, the Fifth Circuit did not question the System Board's factual findings nor attempt to substitute its judgment for the System Board's assessment of the credibility of conflicting evidence. Indeed, there is no material factual conflict—both the System Board and the Fifth Circuit conclude that Johnson's doctor did not prescribe any medicine containing alcohol. (*See* Pet'r App. 12a, 53a.)

Instead, following *Misco* the Fifth Circuit had to decide whether the System Board exceeded its contractual authority by ignoring express terms of the EAP Agreement. *See Misco,* 484 U.S. at 38. The Fifth Circuit vacated the Award because the System Board, despite finding that no doctor prescribed Johnson any medicine containing alcohol, ignored the plain language of the EAP Agreement that the sole, narrow exception to Johnson's immediate discharge for use of alcohol during his course of rehabilitation was medicine containing alcohol prescribed by a doctor. Nothing else

[12] The Court also granted review because it found the Ninth Circuit erred in directing the arbitrator to enter judgment in favor of Garvey for the amount claimed, without further proceedings before the arbitrator. *Garvey,* 532 U.S. at 505.

qualifies. Although it made a factual finding that Johnson's doctor did not prescribe him medicine containing alcohol, which should have required Johnson's discharge, the System Board characterized the prescription-requirement as "highly technical," refusing to impose the parties' mandated remedy for such a violation: termination of employment.[13] (Pet'r App. 53a.) The System Board thereby ignored the contract terms and dispensed its own brand of industrial justice. *Garvey*, unlike this case, never addressed whether the arbitrator exceeded its authority by ignoring an unambiguous contractual term. *See Garvey,* 532 U.S. at 509-11.

Because the Fifth Circuit's decision does not implicate *Garvey's* facts or legal reasoning and in no way mimics the errors of that case, Petitioner's argument that the Fifth Circuit decision here similarly compels the Court's supervisory intervention is completely misplaced.

B. *The Fifth Circuit routinely and correctly applies Misco to affirm labor arbitration awards.*

Petitioner maintains the Fifth Circuit's decision below "manifests a continuing infidelity to the controlling precedents of this Court mandating only limited review" of arbitral awards under the RLA. (Pet. at (i).)

Petitioner cites the Fifth Circuit's decision in *American Eagle* as evidence of its "ever-developing refusal to adhere to this Court's jurisprudence." (Pet. at 16.) Petitioner even goes so far as to allege that the Fifth Circuit has essentially employed a "de novo" standard of review. (*Id.*) Petitioner failed to disclose, however, that the Court considered and

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[13] *See also infra,* part II, Reasons for Denying Petition.

denied certiorari there. *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401 (5th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004). Petitioner also failed to acknowledge the great weight of authority demonstrating the Fifth Circuit's recent and consistent adherence to *Misco*.

The Fifth Circuit is hardly a rogue court. Instead of subverting *Misco*, the Fifth Circuit consistently exhibits great deference to arbitration awards by refusing to overturn them.[14] Further, the Fifth Circuit routinely reverses district

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[14] Recent examples of deferential treatment to arbitration awards include: *Pioneer Natural Res. USA v. Paper, Allied Indus., Chem. & Energy Workers Int'l Union, Local 4487*, 328 F.3d 818 (5th Cir. 2003) (affirming award for period before Union was decertified as collective bargaining representative); *Int'l Chem. Workers Union, Local 683c v. Columbian Chems. Co.*, 331 F.3d 491 (5th Cir. 2003) (affirming award because arbitrator neither acted in manifest disregard for the law nor dispensed his own brand of industrial justice); *Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001) (affirming award requiring reinstatement); *Atchison, T. & S.F. Ry. Co. v. United Transp. Union*, 175 F.3d 355 (5th Cir. 1999) (affirming award requiring reinstatement of a railroad yardman based upon arbitrator's factual finding that the company's drug testing procedure was inadequate); *UFCW, Dist. Local Union 540 v. Pilgrim's Pride Corp.*, 193 F.3d 328 (5th Cir. 1999) (affirming award that applied collective bargaining agreement and did not exceed authority under *Misco's* deferential review standard); *Nat'l Gypsum Co. v. Oil, Chem., & Atomic Workers Int'l Union*, 147 F.3d 399 (5th Cir. 1998) (affirming award under *Misco* analysis); *Six Flags Over Tex., Inc. v. IBEW, Local No. 116*, 143 F.3d 213 (5th Cir. 1998) (affirming award where arbitrator acted within scope of authority); *United Food & Commercial Workers v. Nat'l Tea Co.*, 899 F.2d 386 (5th Cir. 1990) (affirming award where arbitrator acted within scope of authority); *Folger Coffee Co. v. Int'l Union, United Auto., Aerospace & Agric. Workers Local 1805*, 905 F.2d 108 (5th Cir. 1990) (Cont'd)

courts for improperly overturning an arbitration award.[15] Accordingly, there is no need for the Court to intervene to correct any alleged misunderstanding of the well-settled principle of judicial deference to labor arbitration awards. Petitioner's apparent disagreement with the result in

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(Cont'd)
(affirming award that drew its essence from collective bargaining agreement); *Smith v. Alumax Extrusions, Inc.*, 868 F.2d 1469 (5th Cir. 1989) (affirming district court denial of motion to vacate); *Gen. Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Servs., Inc.*, 838 F.2d 794 (5th Cir. 1988) (finding that arbitrator did not exceed his jurisdiction); *Oil, Chem. & Atomic Workers Int'l Union Local 40288 v. Union Oil Co.*, 818 F.2d 437 (5th Cir. 1987); *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72 (5th Cir. 1987) (affirming district court's enforcement of award).

[15] Examples of the Fifth Circuit reversing trial courts to enforce erroneously vacated arbitration awards include: *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368 (5th Cir. 2004) (reversing district court and upholding arbitrator's decision regarding timeliness of grievance filing); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346 (5th Cir. 2004) (reversing district court because arbitrator not in manifest disregard of the law); *Weber Aircraft, Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001) (reversing judgment and enforcing award where reinstating employee did not contradict dominant public policy); *United Food & Commercial Workers v. Nat'l Tea Co.*, 899 F.2d 386 (5th Cir 1990) (reversing district court and enforcing award based upon arbitrator's interpretation of contract); *Dixie Mach. Welding & Metal Works, Inc. v. Int'l Bhd. of Boilermakers, Local 37*, 867 F.2d 250 (5th Cir. 1989) (reversing district court and enforcing award interpreting disputed aspects of old contract); *Oil, Chem. & Atomic Workers Int'l Union Local 40288 v. Union Oil Co.*, 818 F.2d 437 (5th Cir. 1987) (reversing district court and remanding to arbitrator when arbitrator's factual assumption about repeat drug use was proven wrong).

American Eagle is not a reason to grant certiorari here, a case that correctly sets forth the applicable law and, at most, concerns a narrow dispute whether the Fifth Circuit correctly applied *Misco* but has no substantive importance to this Court's developing jurisprudence or any supervisory oversight role.

II. Review Should Be Denied Because The Fifth Circuit Reached The Correct Result.

A. *The Fifth Circuit correctly reversed the System Board for ignoring the express terms of the Agreements.*

Recognizing the correct standard of review, the Fifth Circuit exercised its power to enforce the jurisdictional limits imposed on the System Board by the Agreements, *i.e.*, it proceeded to determine whether the System Board exceeded its jurisdiction by ignoring the plain terms of the Agreements. (Pet'r App. 9a-12a.)

Contrary to Petitioner's argument, the System Board did not "interpret" the Agreements by reinstating Johnson after he violated its terms. Rather, the System Board re-wrote the Agreements to justify what it thought was "fair." Thus, the System Board exceeded its contractual authority by flatly ignoring the Agreements' sole, contractual remedy of termination, which was specifically mandated for any non-prescription use of alcohol, including any over-the-counter medications and substances. (*See* Pet'r App. 53a, 63a-634a.) The Award did not draw its essence from the Agreements.[16]

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[16] Generally, an award exceeds the scope of a labor agreement where: "(1) the award conflicts with the express terms of the agreement, (2) the award imposes additional requirements that are

(Cont'd)

Notwithstanding the broad deference owed to arbitrators, *Misco* and its progeny do not allow unbridled discretion by the System Board. *See Misco*, 484 U.S. at 38 ("The arbitrator may not ignore the plain language of the contract.")

B. *The record is uncontroverted that no doctor prescribed the alcohol Johnson used and that the Agreements required Johnson's discharge for non-prescription use of alcohol.*

The System Board excused Johnson's admitted use of alcohol by concluding that the use of cough syrup generally was "approved" by Johnson's doctor and then equating "approval" (Pet'r App. 53a) with the narrowly-stated EAP exception for "doctor prescribe[d] medication." (Pet'r App. 63a.) The substitution of "approval" of unspecified cough syrup by the doctor's office staff for "doctor-prescribed" medicine containing alcohol clearly rewrites the Agreements, which expressly forbid Johnson from consuming any alcohol. (*Id.*) Only "doctor-prescribe[d] medication" was potentially permitted if properly disclosed.[17] (*Id.*) Johnson testified that

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(Cont'd)
not expressly provided in the agreement, (3) the award is without rational support or cannot be rationally derived from the terms of the agreement, or (4) the award is based on general considerations of fairness and equity rather than the precise terms of the agreement." *Airline Prof'ls Ass'n v. ABX Air, Inc.*, 274 F.3d 1023, 1030 (6th Cir. 2001).

[17] The System Board found that Johnson attempted to inform the EAP director of the cough syrup once he "discovered that the medication contained alcohol." (Pet'r App. 52a-53a.) This finding is curious in light of Johnson's own testimony that he had no idea the medicine contained alcohol when he called the EAP director. (*See* Resp't App. 9a.)

he spoke with his doctor's office (not his doctor) and was told that they could not "prescribe medicine without [his] seeing the doctor." (Resp't App. 8a.) The System Board itself, in the Award, even finds that:

> [T]he Grievant's doctor *did not "prescribe"* the particular medication in the technical sense that it involved a written prescription [of] medication requiring the services of a licensed pharmacist. *Neither did his doctor "prescribe"* a particular brand or type of cough medicine.

(Pet'r App. 53a (emphasis added).)

In the face of uncontroverted evidence that Johnson asked for and was denied doctor-prescribed medication, the System Board's supplanting of "doctor prescribe[d] medication" with "securing his doctor's approval," plainly ignores the unambiguous language of the Agreements. In the words of *Misco*, the System Board was dispensing its own "notion[] of industrial justice." *See Misco*, 484 U.S. at 38.

The System Board also concluded that Johnson "met the letter and the spirit" of the Agreements under the following rationale:

> The fact that the doctor approved the use of a cough medicine, however, surely means that the Grievant did not take it upon himself to somehow circumvent the purpose of the Last Chance requirements by unsupervised self-medication.

(Pet'r App. 53a.) However, the EAP Agreement, which was Johnson's course of rehabilitation for alcohol dependency

prepared by the Substance Abuse Professional following an individualized assessment of Johnson's condition, never had the purpose of preventing "unsupervised self-medication." To the contrary, Johnson could medicate himself however and whenever he chose so long as he did not use medicine *containing alcohol* without first obtaining a doctor's prescription and making proper disclosure.[18] Having made the factual finding that Johnson obtained no doctor's prescription for any medication nor for any particular cough syrup—let alone one containing alcohol, the System Board's failure to enforce the plain terms of the EAP Agreement exceeded its jurisdiction.[19] To treat a telephone discussion with a doctor's office staff regarding unspecified over-the-counter cough syrup as the equivalent of doctor-prescribed medicine containing alcohol, substitutes the System Board's brand of industrial justice for the result agreed upon by the parties as specified by the unambiguous terms of the Agreements.

Once the System Board found Johnson consumed alcohol that was not prescribed by a physician, it had no authority to

[18] "Prescription" is defined as "a direction, usually written, by the physician to the pharmacist for the preparation and use of a medicine or remedy." *Random House Compact Unabridged Dictionary* 1529 (2d ed. 1996). By way of contrast, "over the counter" means "without a doctor's prescription but within the law." *Id.* at 1386.

[19] According to evidence before the System Board, "doctor approval" means nothing more than a diagnosed alcoholic's informal, undocumented, and unverifiable discussions with doctor's office staff about unspecified brands of over-the-counter cough syrup. (*See* Resp't App. 8a.) Frankly, this is exactly the insidious sort of excuse for use of alcohol (and for a .029 on-duty breath alcohol concentration) that the EAP Agreement's strict requirements against any use of non-prescription alcohol were designed to prevent.

ignore the result called for by the Agreements. *See Misco,* 484 U.S. at 38 (holding that the "arbitrator may not ignore the plain language of the contract"). Through the plain terms of the Agreements, particularly the EAP director's very narrow safe harbor from immediate discharge for use of alcohol under the EAP Agreement, the parties themselves set the remedy for a violation. The System Board's sole authority was to enforce the express terms as written, whether it liked the outcome or not. *See id.*

The System Board found that Johnson's doctor did not prescribe him medicine containing alcohol. (Pet'r App. 53a.) The Agreements prohibited any non-prescribed use of alcohol by Johnson, so the Fifth Circuit properly applied *Misco* and vacated the Award to give effect to the language selected by the parties because *Misco* does not permit an arbitrator to disregard express contractual terms. *See Misco*, 484 U.S. at 38.

CONCLUSION

This case is significant to Continental for the safety implications when an arbitrator returns an alcohol-dependent aircraft mechanic, who *already* is in an alcohol rehabilitation program as a "last chance," to work on passenger aircraft after *again* coming to work with alcohol in his system under the tired excuse that it must have been the "cough syrup." But this case is insignificant to the jurisprudence of the Court. It concerns neither a dispute between circuits on an important legal issue nor any manifest disregard by the Fifth Circuit for this Court's jurisprudence. Instead, the Fifth Circuit applied well-settled law in vacating the System Board's award, consistent with *Misco*. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 15, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-20136

CONTINENTAL AIRLINES INC.

Plaintiff - Counter Defendant - Appellant

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Defendant - Counter Claimant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to vacate the District Court's Order of February 9, 2004, is DENIED.

IT IS FURTHER ORDERED that appellee's alternative motion to expedite the appeal is GRANTED.

s/ [initials of Circuit Judges]

APPENDIX B — ORDER GRANTING STAY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED FEBRUARY 10, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-03-817

CONTINENTAL AIRLINES, INC.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendant.

ORDER GRANTING STAY

Plaintiff Continental Airlines, Inc. ("Continental") has moved to Stay Enforcement of Arbitration Award Pending Appeal (Document No. 23), pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. After having carefully reviewed the motion, Defendant's Response in opposition, reply, arid applicable law, the Court concludes that the motion should be granted.

An application under Rule 62(c) is addressed to the discretion of the Court, but the Court is required to examine certain factors: (1) whether the movant has made a showing

of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest. *Hilton v. Braunskill*, 107 S. Ct. 2113, 2119 (1987); *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992); 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 2904, 501 (1973). In cases where the movant presents a serious legal question, a movant need not always show a "probability" of success on the merits. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). In such instances, a movant need only present a substantial case on the merits and show that the balance of equities weighs heavily in favor of granting the stay. *Id.*; *see also Wildmon*, 983 F.2d at 23. "[I]f the balance of equities (i.e., consideration of the other three factors) is not heavily tilted in the movant's favor, the movant must then make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal." *Ruiz*, 650 F.2d at 565-66.

First, the Court finds that serious legal questions are involved in this case, which were addressed at length in its Memorandum and Order. The case also implicates serious and important public safety concerns regarding alcohol use while engaged in safety-sensitive work in the airline industry. *Cf. Wildmon*, 983 F.2d at 23-24 (finding no serious legal issue involved where the dispute had no "public concerns"). Further, Continental has presented a substantial case on the merits.

Appendix B

Given that serious legal questions are presented by this case and that Continental has presented a substantial case on the merits, the Court must balance the equities. Continental states that it will be irreparably injured if Continental is successful on appeal but in the meanwhile has paid all of the back wages and benefits to the employee Johnson who, after reversal of this Court's judgment, may have expended the funds and not have the resources to repay Continental. Continental also argues that there would be no detriment to Johnson because Continental's liability to him would continue to accrue, and he, at the end of the day if the Union prevails on appeal, would have full recompense for his injury. Continental makes a particularly forceful argument with regard to the public interest, namely the risk involved in returning Johnson to his safety-sensitive aircraft mechanic's job notwithstanding the System Board's determination that Johnson showed a pathetic lack of knowledge and a lack of commitment to lead a life of sobriety.

The Union, on the other hand, responds that Johnson has been out of work for some three years and is without medical treatment, that his wife is currently on a list of organ transplantation and her ability to qualify may be endangered by a lack of medical coverage, and that Johnson and his wife may well suffer irreparable injuries and substantial harm if the judgment is stayed. The Union states further that Continental's payment of backpay to Johnson would not result in irreparable loss to Continental within the meaning of the law because a judgment for monetary damages can satisfy Continental's injury. The Union has presented no evidence, however, that Johnson is capable of satisfying a judgment for damages of such size to prevent Continental's loss from being irreparable.

Appendix B

There is no evidence to substantiate the Union's contentions regarding Mrs. Johnson's medical condition or health care coverage, but assuming the truth of such assertions, a spouse's medical condition, even while serious, is still collateral or peripheral to this employment dispute in which she is not involved. There is no showing that Johnson himself would suffer any irreparable or even appreciable injury if a stay is issued. Continental, as has been seen, is vulnerable to irreparable loss if a stay is not granted. In fact, if a stay does not issue and Continental is successful on appeal, its irreparable injury may consist not only of three years of back wages and benefits it pays to Johnson and may not recoup but also the incalculable damage to its operations in having to guard against Johnson's potential errors if he resumes alcohol abuse on the job.

Indeed, most compelling are the public policy concerns that strongly favor the granting of a stay in this most troubling situation. Johnson has a demonstrated propensity to abuse alcohol and has reported for work as an airline mechanic while intoxicated. If this Court has erred in its judgment and is reversed by the Court of Appeals, then Johnson's return to work as a commercial airline mechanic engaged in safety-sensitive work during pendency of the appeal would pose an unwarranted risk to the public and, under worse case assumptions, may result in a disaster. The balance of equities therefore weighs heavily in favor of a stay of this Court's judgment until it has been reviewed on appeal. It is therefore

ORDERED that Continental's Motion to Stay Enforcement of Arbitration Award Pending Appeal (Document No. 23) is GRANTED and enforcement of the

Appendix B

Court's Memorandum and Order, and its Final Judgment, both entered January 8, 2004, is STAYED pending Continental's timely prosecution of an appeal to the United States Court of Appeals for the Fifth Circuit.

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 9th day of February, 2004.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — EXCERPTS OF EXAMINATION OF MARK JOHNSON DURING ARBITRATION PROCEEDINGS DATED SEPTEMBER 24, 2002

Arbitration Proceedings – Mark Johnson
September 24, 2002

CONTINENTAL AIRLINES, INC.

PILOTS' SYSTEM BOARD OF ADJUSTMENT

GRIEVANCE NO. CAL-IBT
01-020
Mark Johnson

CONTINENTAL AIRLINES, INC.,

Company,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Union.

TAKEN AT: Sheraton North Houston Hotel
15700 John F. Kennedy Blvd.
Houston, Texas 77032

DATE: September 24, 2002
TIME: 10:00 a.m.

Appendix C

* * *

Mark Johnson - September 24, 2002
Direct Examination by Mr. Hicks

Q. When were you able to make an appointment for?

A. It wouldn't be till Friday, the following Friday.

Q. And did you talk with the doctor's staff about what you could do in the meantime?

A. Yes, sir, I did.

Q. What did they recommend to you?

A. I did Tuesday, they recommended from my case. They could not give me a prescription drug with not seeing the doctor. I told them about my allergies and then I had flu-like symptoms and certain symptoms that were pertaining which were going on, and told them my case as far as with Continental, and they said, well -- I told them could I take this, that, and the other, and they said yes, until -- that will be fine until you get to the office before we can prescribe the medicine for you. We can't do it -- could not give me -- prescribe medicine without seeing the doctor.

Q. Did they make any recommendations as to any over-the-counter drugs?

A. Yes, they said to go ahead, cough medicine.

Appendix C

Q. Did you obtain some cough medicine?

A. Yes, I did.

* * *

Mark Johnson - September 24, 2002
Cross-Examination by Mr. Wall

Q. (BY MR. WALL) So is it true that you called Steve Skidmore because you knew that the cough medicine had alcohol in it?

A. No. I called Steve Skidmore to let him know that I was taking something, ingesting something for my cough, my congestion. Whether it be, I don't care, aspirin or whatever, I was required to tell Steve, the EAP, what I was taking other than Coca Cola or water or iced tea.

Q. Okay, let me ask this again. And again, most of these questions you only have to answer yes or no. Did you know when you took the cough medicine that it had alcohol in it?

A. No, I didn't even -- no.

Q. Did you think that was important to know whether it did?

A. Pretty much. It was given to me by her. I told him this is what I was on. I didn't --

* * * *